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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

MARY KATHRYN GRIFFITH, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF GEORGE L. GRIFFITH, DECEASED,

Petitioner,

versus

CANAL BARGE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
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FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Mary Kathryn Griffith, individually, and as the administratrix of the Estate of George L. Griffith, deceased, prays that a Writ of Certiorari issue to review the Judgment and Opinion of February 26, 1971, rendered by the United States District Court, Northern District of Mississippi, Greenville Division, the Judgment and Opinion of March 30, 1973, of the United States Court of Appeals, Fifth Circuit and the Judgment and Opinion on Petition for Rehearing, of May 16, 1975 in the proceedings entitled *Petition of*

Canal Barge Company, Inc., as Owner and Operator of the M/V ELAINE JONES, Praying for Exoneration from or Limitation of Liability, Canal Barge Company, Inc. vs. Mary Kathryn Griffith, Individually, and as the Administratrix of the Estate of George L. Griffith, Deceased, and Terminal Railroad Association of St. Louis, et al.

OPINIONS BELOW

The Judgment and Opinion of the United States District Court for the Northern District of Mississippi, Greenville Division (App. Infra, pp. 1a-42a) is reported at 323 F.Supp. 805; the Judgment and Opinion of the United States Court of Appeals, Fifth Circuit (App. Infra, pp. 43a-89a) is reported at 480 F.2d 11; the Judgment and Opinion of the United States Court of Appeals, Fifth Circuit on Petition for Rehearing (App. Infra, pp. 89a-90a) is reported at 480 F.2d 34 and the final Judgment and Opinion of the Fifth Circuit (App. Infra, pp. 90a-94a) is as yet unreported.

JURISDICTION

The jurisdiction in the Court of the first instance is 28 USC § 1331, in that, the complaint of Mary Kathryn Griffith, individually, and as administratrix of the Estate of George L. Griffith, deceased, establishes this action as one of wrongful death resulting from the negligence of Canal Barge Lines, Inc. (hereinafter referred to as Canal), and is brought pursuant to the Jones Act (46 USC § 688) and the General Maritime Law, and, also, for the unseaworthiness of the Motor Vessel ELAINE JONES. The United States District Court, Northern District of Mississippi, held Canal

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liable for damages to Mary Kathryn Griffith. Canal appealed, claiming error with respect to liability and damages to Mrs. Griffith. Mrs. Griffith cross-appealed with regard to the amount of damages awarded and the elements of damages denied. The Fifth Circuit affirmed the District Court with respect to Canal's liability to Mrs. Griffith, yet at the same time reversed with respect to damages due Mrs. Griffith and with respect to her husband's contributory negligence. A remand to the District Court was then ordered for determination of the degree or extent of that contributory negligence and Canal's claim for indemnity from the Griffith Estate. Subsequently, on petition for rehearing, the Fifth Circuit reversed itself and the Trial Court with respect to its position in allowance of a two percent cost of living increase in the computation of lost future earnings of the deceased, and reversed itself in its past exclusion of survivor's grief damages as an element of recovery in a general maritime action for death caused by unseaworthiness. An application for a stay of the mandate of the Appellate Court has been granted, conditioned upon presentation of the Notice of Application for a Writ of Certiorari to the Clerk of the Fifth Circuit prior to June 26, 1975. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

I. Whether or not the Court of Appeals erred in determining the actions of pilot, George L. Griffith, of the M/V ELAINE JONES, require the conclusion that he was contributorily negligent as a matter of law and that such contributory negligence was a proximate cause of the accident.

II. Whether or not the Court of Appeals erred by excluding a two percent cost of living increase in the computation of loss of future earnings of the deceased, previously awarded by the Trial Court and whether or not said two percent factor was necessarily tied to an increase in the cost of living.

III. Whether or not the Court of Appeals erred in refusing to reduce the Trial Court's assessment of twenty-five percent of decedent's earnings as being attributable to his personal use.

STATEMENT OF THE CASE

In order for this Court to be completely apprised of the substantial evidence in the voluminous record, we believe it necessary to amplify the circumstances giving rise to this protracted litigation. This exposition is further necessitated by past variances between written summations of fact and the events themselves.

On the date of the subject accident, October 14, 1969, Canal Barge Company, Inc., owned and operated the M/V ELAINE JONES, a diesel powered towboat, 154 feet long, 40 feet wide, possessed of approximately 5,300 horsepower, and built in 1967. (Petitioner's Exhibit 17-H, answer to interrogatory 4b, T. 83). At approximately 12:20 P.M. on that date, the M/V ELAINE JONES collided with an arch of the Eads Bridge, spanning the Mississippi River at St. Louis, Missouri, and connecting East St. Louis, Illinois, with the City of St. Louis.

As a result of said collision, the pilot house of the M/V ELAINE JONES was completely severed and destroyed; her pilot, George L. Griffith, was killed; and the Eads Bridge was damaged.

George L. Griffith was, at the time of this collision and his death, regularly employed by Canal Barge Company as a river towboat pilot, having become so employed by Canal on January 7, 1968, and was the regular pilot aboard the M/V JOSEPH M. JONES, a diesel powered towboat of 4,300 horsepower, also owned and operated by Canal (T. 179, 333).

On October 14, 1969, Vernon E. Stroschein was serving as captain of the M/V ELAINE JONES; however, his regular assignment was as captain of the M/V CAROLINE, an 1,800 horsepower diesel powered vessel, of smaller size, different design and configuration, also owned and operated by Canal (T. 355, 445, 475, 494-495). On September 29, 1969, Vernon E. Stroschein was assigned to crew as pilot aboard the M/V ELAINE JONES at Natchez, Mississippi, when her regular captain went off duty. As of that date, Captain Stroschein had never before served aboard the M/V ELAINE JONES. On October 7, 1969, George L. Griffith was assigned to crew as pilot aboard the M/V ELAINE JONES at Memphis, Tennessee, when her regular relief captain went off duty, and Vernon E. Stroschein was elevated to the position of captain (T. 495-496). As of that date, pilot Griffith had never before served aboard the M/V ELAINE JONES. (T. 180, petitioner's exhibit 17-B, answer to interrogatory 6B).

Prior to September 29, 1969, with the exception of approximately two weeks, Captain Stroschein had never

before served in the wheelhouse of a river towboat being possessed of greater than 3,200 horsepower. At no time had he ever served in the wheelhouse of a vessel of the ELAINE's size and design (T. 494).

After the pilot Griffith boarded the ELAINE at Memphis, she proceeded northbound to and passed through St. Louis Harbor on October 9, 1969, when the river stage was at approximately five feet on the St. Louis gauge. The ELAINE then traveled through Lock 27, approximately five miles north of the Eads Bridge, through Lock 26, approximately eighteen miles north of the Eads Bridge, thence entering the Illinois River. On October 10, 1969, after traveling approximately 74 miles up the Illinois River, the ELAINE encountered a rainstorm of such severity that she was forced to "hold up" or stop. This rainstorm persisted for approximately 24 hours. On October 13, 1969, at 10:35 A.M., approximately 147 miles up the Illinois River, the ELAINE exchanged a tow with the M/V LEONIDAS POLK, another Canal boat, picking up seven empty barges in that exchange and turned southbound.

After obtaining the tow of the M/V LEONIDAS POLK, of seven empty barges, the ELAINE then proceeded southbound to retrace her earlier route until she arrived at a fleeting facility at Wood River, Illinois, on the Mississippi, south of Lock 26 and just north of Lock 27, at approximately 5:45 A.M. on October 14, 1969. The pilot Griffith was on watch at the wheel of the ELAINE when she arrived at Wood River, Illinois, but was relieved by Captain Stroschein upon arrival.

After relieving the pilot Griffith, on the morning of October 14, 1969, Captain Stroschein rearranged the tow of seven empty barges exchanged with the M/V LEONIDAS POLK and picked up two loaded barges and an additional empty barge. The tow of the ELAINE, as then made up, was ten barges: two loaded and eight empty, being two barges wide and five barges long. The two loaded barges were the two rearmost barges in the port or lefthand string, with the ELAINE being made up to the rearmost loaded barge in the port string. The overall length of the ELAINE's tow, as thus made up, was approximately 1,050 feet plus the length of the ELAINE, i.e., 154 feet.

Captain Stroschein accomplished the makeup of the foregoing tow and departed Wood River, southbound, at approximately 9:45 A.M., entering Lock 27 at 11:25 A.M. on the same morning.

At approximately 11:45 A.M. on the date of the accident in suit, pilot Griffith came to the wheelhouse of the ELAINE to relieve Captain Stroschein as the gates of Lock 27 were opening. The ELAINE departed Lock 27, with pilot Griffith at the wheel, at 11:50 A.M. southbound to St. Louis Harbor.

(The foregoing account of the voyage of the M/V ELAINE JONES from Memphis on October 7, 1969, northbound and her return to St. Louis Harbor on the date of the accident, is set forth in detail through the testimony of her captain, Vernon E. Stroschein, at pages 481 through 484 and 497 through 502 of the transcript, as well as the wheelhouse and engine room logs, Petitioner's Exhibits 9 and 12).

A vessel departing Lock 27, southbound, is immediately confronted with the Merchants Bridge (Mile 183 U.M.R.) and the McKinley Bridge (Mile 182.5). These bridges present to a downbound vessel a limited amount of horizontal clearance and therefore must be navigated with care. Immediately after passing the McKinley Bridge, a downbound vessel and tow must then line up or commence its maneuver and approach to safely navigate the Veterans Bridge (Mile 180.2) and the Eads Bridge (Mile 180). The Poplar Street Bridge (Mile 179.3) and the McArthur Bridge (Mile 179) are just downriver from the Eads Bridge. Above Veterans Bridge a gradual bend in the river commences and extends to a point below the McArthur Bridge. To a downbound vessel, this bend breaks from its left to its right. (Petitioner's Exhibit 13)

Of the six bridges traversing the Mississippi River at St. Louis, the Eads Bridge has its superstructure below the vehicular deck level rather than above it. The construction of the Eads Bridge therefore presents an arched passageway for vessels traveling through and under it (Joint Exhibit 31). The Veterans Bridge is so constructed that it has but one pier situated in the riverbed, while the Eads Bridge has two such piers. The one pier of the Veterans Bridge is substantially in line with the left descending pier of the center, or channel span of the Eads Bridge. (Claimant's Exhibit 30)

Due to the close proximity of the Veterans and Eads Bridges, i.e., two-tenths of a mile, it is necessary that downbound vessels and their tows be "lined up" or "in shape" to run both the Missouri or channel span of the Veterans and the center or channel span of the Eads

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Bridge when the head of the tow is no closer than one-half mile above the Veterans Bridge, which is referred to as the "point of no return" or the "fail safe" point. (T. 509)

Due to the plurality of bridges, their close proximity and construction, coupled with the meander of the river and its currents, St. Louis Harbor enjoys the reputation among river people of being a difficult area or passage to safely navigate (T. 533).

At the time of the ELAINE's departure from Lock 27, the river stage at St. Louis Harbor was 30.3 feet on the Market Street Gauge and rising (T. 264). At flood stage of the river (30 feet), the horizontal and vertical clearance under the channel span of the Eads Bridge is substantially reduced (T. 559). When the Mississippi River is at flood stage, the current immediately above the Veterans Bridge, or approximately one-fourth mile north thereof, runs from the right descending bank to the left descending bank. This current condition is called in maritime jargon a left hand "set" or "draft". This left hand set, or cross-current, is not encountered by a downbound vessel, except in high water, i.e., in excess of 20 feet. At all other times, the current in this vicinity runs straight down the river (T. 505-506). As the stage of the river increases above 20 feet, the force of this left hand set likewise increases. Also, as the rate of the rise in the river increases, the force of the set increases. (Petitioner's Exhibit 16 at page 18, and T. 568-569).

When navigating St. Louis Harbor, downbound, in low water, it is an acceptable practice to approach the Veterans and Eads Bridges, and pass under both,

along the mid-channel sailing line, as depicted on the official charts of the U.S. Corps of Engineers. (Petitioner's Exhibit 13, T. 580-582, 763). When navigating St. Louis Harbor downbound, in high water, i.e., in excess of 20 feet, it is the commonly accepted practice, in order to compensate for the left hand set encountered just above Veterans Bridge, to approach Veterans Bridge to the right of the mid-channel sailing line, or closer to the Missouri shore. By this method, the vessel and tow are not forced by that set off, or to the left of, the mid-channel sailing line, as it runs immediately beneath both the Veterans and Eads Bridges (T. 589-598 and Petitioner's Exhibit 16, beginning at Page 57). A downbound vessel and tow that approaches the Veterans and Eads Bridges, in high water, along the mid-channel sailing line is therefore too wide or "out of shape" to safely navigate the passage through and beneath both bridges (T. 743-744).

Prior to departing the fleeting facility, at Wood River, at 9:45 A.M. on the date of the accident in suit, Captain Stroschein was fully cognizant of the fact that the river at St. Louis harbor was at flood stage and that it had risen thereto at an inordinately rapid rate over the preceding few days (T. 483-487, 505). Canal's marine superintendent and port captain at Natchez, Mississippi, monitored radio traffic throughout the day between the many boats and their shore-based facilities, operating in and around St. Louis Harbor from October 9, 1969, through October 14, 1969. In addition, twice daily radio contact was made by these Canal officials with the M/V ELAINE JONES and several other Canal boats plying the waters of the Mississippi River in and around St. Louis Harbor, over

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the same period of time. For these reasons, and by the admission of Canal's port captain, Earl Ray Daily, Stroschein was privy to the conditions existing in St. Louis Harbor, on the date of the subject accident (T. 346-348, 572-573).

When pilot Griffith came on watch at 11:45 A.M. on October 14, 1969, to relieve Captain Stroschein, he, the pilot, had no prior experience in navigating this particular tow, due to the fact that its makeup occurred entirely during the captain's watch, just preceding the ill-fated watch (T. 498-504). At the time of this same watch change, just prior to departing Lock 27, the pilot inquired of the captain concerning the idiosyncrasies of the tow as then made up. However, the captain was unable to advise the pilot, for he, the captain, had not yet himself had an opportunity to learn its characteristics or "get a feel for the tow". (T. 502-504).

The pilot Griffith had never before navigated a vessel and tow southbound through St. Louis Harbor in high water; however, Captain Stroschein had (T. 505). In addition, the pilot, George L. Griffith, was not sufficiently familiar with the tow to navigate St. Louis Harbor under the circumstances existing, in that he had not had an opportunity to gain a "feel for the tow" before he encountered the subject peril. (T. 745-746).

At 11:50 A.M. on the date of the accident in suit, as the pilot Griffith moved the head of the ELAINE's tow out of Lock 27, Captain Stroschein left the wheelhouse and retired to the galley to take his noon meal (T. 505). At approximately 12:10 P.M., Captain Stroschein returned to the wheelhouse. Upon his return, he noted that the head of the tow was approximately half-way

between the McKinley Bridge (Mile 182.5) and the Veterans Bridge (Mile 180.2) or in excess of one mile above Veterans Bridge (point X on petitioner's Exhibit 13). At this moment, the head of the tow and the stern of the ELAINE were lined up on the mid-channel sailing line as depicted upon petitioner's exhibit No. 13 (T. 506-507).

Following the captain's return to the wheelhouse, pilot Griffith continued on along the mid-channel sailing line to a point where the head of the tow was approximately one-quarter of a mile north of Veterans Bridge (Point "Y" on petitioner's Exhibit 13) and the head of the tow and the stern of the ELAINE were lined up on the green lights of the Veterans and Eads Bridges, when the left hand set was encountered, causing the vessel and her entire tow to be pushed violently to the left and off the mid-channel sailing line. The ELAINE and her tow were moving downriver at approximately 12 miles per hour, over land, at this time (T. 506-510).

Had the pilot maintained his heading, as affected by the left hand set, the ELAINE and her tow would have proceeded on downriver and collided with the pier of the Veterans Bridge or the left descending pier of the center span of the Eads Bridge, or with the arch of the superstructure of the Eads Bridge (T. 511). In that the ELAINE and her tow were beyond the fail safe point, or point of no return at the time the left hand set was encountered, the pilot Griffith could not stop or turn back and had no alternative but to attempt to somehow overcome the set and steer his flotilla beneath the Veterans and Eads Bridges, with the chance of a safe

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passage beneath the arch of the Eads Bridge being drastically reduced by the flood stage of the river (T. 515-516).

In an attempt to avoid colliding with the pier of one or both these bridges, and to navigate their passage so as to bring the ELAINE, whose wheelhouse stood some 43 to 44 feet above the water line, beneath the center of the arch of the center span of the Eads Bridge where sufficient vertical clearance was available, pilot Griffith placed his rudders in a hard starboard steer (T. 514). The ultimate object or purpose of the hard starboard steer by pilot Griffith was to achieve a "point" with the head of his tow somewhat to the right side of the channel span of the Eads Bridge, hold that point for a precise length of time so as to permit him, at that precise moment, to bring his rudders back to port and "swing" the ELAINE to the right and directly beneath the center of the Eads arch, the only point where sufficient clearance was available for the ELAINE's passage beneath the superstructure of the Eads Bridge (T. 516, 759). The natural consequence of the hard starboard steer was to cause the stern of the ELAINE to "slide" to port or to the left toward the pier of the Veterans Bridge (T. 758-759). Due to the characteristics of the tow, i.e., eight empties and two loads, with the two loads being at the rear of the port string, it was difficult, if not impossible, for pilot Griffith to either achieve or hold the "point" necessary to successfully accomplish the planned maneuver. All the while, the stern of the ELAINE continued its rapid swing or "slide" to port, toward the pier of the Veterans Bridge (T. 759). In spite of the inability of the tow to achieve and hold its "point", pilot Griffith managed to get the tow beneath the Veterans Bridge and past its pier;

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however, the slide of the ELAINE's stern continued and the port stern corner bumped or collided with the pier of the Veterans Bridge, breaking out all of the wires connecting the port side of the ELAINE with her tow (T. 521). At the time of the collision of the port stern corner of the ELAINE with the pier of Veterans Bridge, the head of the tow was under the Eads Bridge, below and to the right or Missouri side of the center of the channel span of the Eads Bridge (T. 514-515).

From the time of his return to the wheelhouse at 12:10 P.M. until encountering the left hand set just above Veterans Bridge, Captain Stroschein did not criticize, correct or comment upon the manner in which pilot Griffith made his approach to the bridges, nor inform him of the left hand set he was to encounter. Neither did Captain Stroschein assume command of the vessel (T. 502-538). Captain Stroschein testified that he would have approached the Veterans and Eads Bridges in the same manner as did pilot Griffith (T. 521).

After the collision of the port stern of the ELAINE with the pier of Veterans Bridge and the parting of the port face wires, the tow of the ELAINE went out of control, became cross-wise to the downriver current, but remained fixed to the ELAINE at her starboard push knee (T. 521-522). Following the collision of the port stern of the ELAINE with the pier of the Veterans Bridge and the parting of the port face wires, Captain Stroschein realized that the out-of-control tow was going to pull the ELAINE into a collision with the left descending pier of the center span of the Eads Bridge and cause her to capsize and sink. Fearing for his life and limb, Captain Stroschein abandoned the wheel-

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house by departing through one of the wheelhouse doors to the outside deck, running aft and down two deck levels to the rear of the boat and a position of safety (T. 522-528). After Captain Stroschein's departure from the wheelhouse, pilot Griffith stayed on to bring the ELAINE's engines to full reverse and maneuver her off the left descending pier of the channel span of the Eads Bridge. Had he not done so, the ELAINE would have collided with that pier, capsized and sunk, with the possible loss of some or all of the crew (T. 522-523). After maneuvering the ELAINE off the pier of the Eads Bridge, but just before the collision of her wheelhouse with the superstructure of the bridge, pilot Griffith departed the wheelhouse but was crushed and killed by a falling heavy section of the superstructure, before reaching a position of safety (T. 452). Following the collision with the arch of the Eads Bridge, the starboard face wires securing the tow to the ELAINE parted and the tow traveled downriver, colliding with other craft and bridges. The ELAINE herself, after clearing the Eads Bridge, went out of control and was captured and later tied off by two harbor boats in the area (T. 452-453).

The M/V ELAINE JONES could have safely navigated the Veterans and Eads Bridges had her approach from upriver been closer to the Missouri shore so as to compensate for the left hand set encountered just above Veterans Bridge (T. 746). On the date before, the day of, and the day after the collision, when the river was higher, many other boats of the same and lesser sizes and horsepower as the ELAINE safely navigated St. Louis Harbor with mixed tows of both greater and lesser size (T. 564-567).

Captain Stroschein had navigated St. Louis Harbor, downbound, prior to this voyage and had encountered the aforementioned left hand set but did not communicate this experience to pilot Griffith nor did he instruct the pilot how to navigate the harbor (T. 506).

REASONS FOR GRANTING THE WRIT

It is submitted that the Fifth Circuit Court of Appeals erred in its holding that as a matter of law Griffith was chargeable with knowledge of the unusual conditions existing in the river at the time and place of the accident and that his failure to acquire such knowledge breached a legal duty owed by him in this instance. Alternatively, the Court erred in finding that such a legal duty was owed by Griffith to his employer, Canal Barge Company, and in its failing to recognize that a different duty was owed by Griffith to third parties on the river.

Secondly, the Court of Appeals erred in holding that the negligence with which it charged Griffith proximately caused the resultant loss, in view of the fact that had Griffith met the standard of care imposed by the Appellate Court, i.e., made inquiry of his captain regarding navigation of the vessel and tow, the subject accident would still have been occasioned because the captain with his superior knowledge of the existing hazards concurred in the manner in which Griffith approached St. Louis Harbor.

Thirdly, the Court erred in its reversal of the Trial Court in refusing to allow the Trial Court to consider in the element of damages a two percent anticipated annual increase in the cost of living.

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Finally, the Court of Appeals erred in allotting twenty-five percent of Griffith's earnings as being attributable to his own personal use had he lived.

With respect to the above issues, there exist conflicts in decisions of the various appellate courts and it is submitted that the opinion of the Court of Appeals in this instance is in conflict with prior decisions of this Honorable Court. Moreover, the Fifth Circuit Court of Appeals reversed its own earlier opinion in this very same case.

ARGUMENT

I.
The Appellate Court Erred In Holding Griffith Negligent

The Fifth Circuit Court of Appeals, in reversing the Trial Court, has concluded that Griffith was guilty of some negligence and that his negligence was a proximate cause of the collision. It is respectfully submitted that the Appellate Court erred on both counts. Hereinbelow, the issues relating to negligence and those of proximate causation will be treated separately.

The Trial Court finding of lack of actual knowledge of the particular hazard on the part of Griffith was not disturbed by the Court of Appeals. However, Griffith was found negligent by the Appellate Court predicated on constructive knowledge chargeable to him as a matter of law. To the Court, his negligence was generated by his failure to apprise himself of the navigational hazards to which his tow was exposed.

To sustain this finding, the Court turned to a number of authorities which admittedly held that a pilot of a river steamer was presumed to have that knowledge of existing conditions which should be expected of one who holds himself out as a member of this particular profession. On one hand, it is felt that the cited cases are distinguishable on the basis that each of the factual situations involved presented an opportunity for the pilot involved therein to acquire knowledge of the hazard which gave rise to the various accidents in which their vessels were involved. On the other hand, they are distinguishable regarding the threshold issue of isolating the party to whom the duty of due care is owed before the question of liability can be reached.

Unlike the cited cases, Griffith had no opportunity to discover the hazard into which he navigated his vessel and tow other than from Captain Stroschein himself. When Griffith completed his watch prior to the time that his flotilla reached the St. Louis Harbor, he could not then possibly have been aware of this flotilla's location downstream at a later point in time when he was scheduled to resume his watch. Obviously, without this information, there was no reason for him to make any inquiry regarding conditions at some location then unknown to him. When he did subsequently return to relieve Captain Stroschein as the pilot of this flotilla, they still had not yet entered the St. Louis Harbor but were approaching same and with a tow in a different configuration than that which Griffith had handled at the completion of his previous watch. Upon retaking the wheel, he specifically inquired of Captain Stroschein regarding any idiosyncrasies of the newly madeup tow. What was Captain

Stroschein's reply? He stated that he did not know. But more important to the questions to be resolved by this Honorable Court is what Captain Stroschein did not say! Here was an invitation by the pilot under his command for the impartation of critical information. However, not one word of advice was offered relative to the hazard which they were then approaching and of which only Captain Stroschein had actual knowledge. The inquiry of the handling characteristics proposed by Griffith impliedly invited all information regarding the handling of the vessel and tow as it was undertaken by Griffith and the response of Captain Stroschein was only a partial answer to the question, with elements of the hazards known to Captain Stroschein being omitted. Lulled by the response of his superior officer, one should not expect Griffith to have further pursued an inquiry which he could not reasonably anticipate as having been incompletely answered. Moreover, the only practical and reasonable source of navigational information was that of Griffith's employer, Canal, and its Captain Stroschein. We are cognizant of the language contained in the Appellate Court opinion concerning the possibility of Griffith obtaining information from "other sources", but submit to this Honorable Court that Griffith had, under the circumstances, no reason to go to other sources, but to the contrary, had every reason to expect that any pertinent information of such a nature would have been provided him by his employer. To place any greater duty upon Griffith would be totally unreasonable, particularly with respect to a consideration of any duty owed by him to his employer.

We turn to the questions of duty. It is an elementary principle of law that negligence arises only upon a breach of a duty which was owed to the person who has been damaged thereby. It is axiomatic that only a party to whom Griffith owed a duty could complain of his failure in meeting such duty. It has apparently been assumed that such a duty was owed by Griffith to Canal Barge Company, for this is the only basis on which Griffith could be found negligent with respect to it. However, this presumption of a duty by Griffith to Canal is an erroneous one, for there is no basis under the facts of this case on which to establish such a duty. The Appellate Court cites numerous authorities for the proposition that the pilot of a vessel is presumed to know of the prevailing conditions existing at any point which he might navigate. Although this presumption exists in our law, it is inappropriately relied upon here by the Court in the search for an answer to whom the duty of having such knowledge is owed. It is one thing to say that a vessel which collides with a "dumb object", or another vessel, as the result of having improperly navigated a prevailing condition, establishes a presumption of knowledge and negligence on the part of a pilot, and yet another to employ that rule and presumption when the contest is between an employer and employee, such as we have here. Certainly, one would not argue, as against the owners of the Eads Bridge, that Canal's liability or responsibility in connection with this accident would be any different had Captain Stroschein chosen to put the cook at the wheel to run St. Louis Harbor on October 14, 1969. By that same token, however, can one successfully argue, under these hypothetical circumstances, that had the cook met with his demise, as did George L. Griffith, he would have been guilty of com-

parative negligence barring recovery by his widow and estate for his death? We think not. Petitioner, of course, does not by this hypothetical query intend to imply that George L. Griffith should be likened to the cook. To the contrary, he was obviously an extremely able mariner, far more fit to serve in his capacity as a wheelman than was the ELAINE's master, Vernon E. Stroschein. His failing, if it could be classed as such, was simple ignorance of an existing fact or condition, of which the master had superior knowledge, which knowledge the master did not communicate to him.

The decision to depart Wood River, a position of relative safety, was made by the captain who was then at the vessel's wheel. The ELAINE was committed to the voyage through St. Louis Harbor at the time that George L. Griffith assumed the helm. Captain Stroschein tendered an unwieldy tow to the pilot who was inexperienced therewith in difficult circumstances, failing to inform him of known hazards and to instruct him in the proper manner of navigating same. Then, once the pilot encountered the violent cross-current or set, the captain failed to assume command from the pilot and, in fact, abandoned the wheelhouse in the face of the imminent peril. Finally, and most importantly, Griffith's navigation of these bridges was attempted under the watchful eye of Captain Stroschein, who, by his failure to warn Griffith of the left hand set above the Veterans Bridge, precluded any attempt by Griffith to effectively compensate therefor. It is inconceivable that Griffith could be found guilty of comparative negligence in performing a task assigned to him by a superior officer under the direct care and supervision of that officer, who never raised objection to that performance.

It is submitted that the Trial Court was eminently correct in its finding that George L. Griffith was free of any degree of comparative negligence in causing or precipitating the accident in suit.

II.

The Appellate Court Erred In Its Holding Of Proximate Cause

Now turning to the question of proximate cause, it is submitted that the Court of Appeals again fell into error in making such determination.

Proximate causation is met when it can be legitimately determined that the result flowed as a natural consequence of a wrongful act. In measuring whether or not the test of proximate causation has been met in the subject inquiry, it must be determined that there is, in fact, this nexus between the act and the result. Accordingly, although the course of action undertaken by Griffith resulted in the subject accident, proximate causation cannot exist in the absence of circumstances which would have led to an avoidance of this collision. As stated in the preceding portion of this application, inquiry was made by Griffith when he assumed the wheel of the M/V ELAINE which was not fully met by Captain Stroschein and which lulled Griffith into believing that the course of action which he was following was a correct one. In light of Captain Stroschein's tacit approval of that course (by his silence in the face of his observation of Griffith's selection thereof and his after-the-fact admission that he would have navigated the harbor in the same

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manner as did Griffith), it is submitted that any inquiry by Griffith of Stroschein concerning the existence of hazardous conditions in the harbor on the date of the accident in suit would have been a vain and useless act, for Stroschein's obvious reply would not have resulted in any change in Griffith's handling of the tug and tow. In view of the fact that Griffith's course of action would have remained unchanged by any inquiry which might have been made of Captain Stroschein, it can hardly be said that such failure was a proximate cause of the resulting collision which, under the facts and circumstances indicated herein, was inevitable.

III.

The Error Of The Court Of Appeal In Reversing The Trial Court's Allowance Of An Increment Of Damages In The Amount Of Two Percent

The Finding of Fact submitted by the Trial Court did not characterize the two percent per annum damage increment as being compensation for an inflationary trend. It is submitted that there was ample evidence to support this allowance based upon the anticipated future increases in pilot Griffith's income unrelated to inflationary trends. However, out of an abundance of caution, the following comments are offered as an alternative basis which would fully support this particular element of damage.

The denial of an allowance for an inclusion of a two percent cost of living increase in computation of loss

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of future earnings, as a result of decreased purchasing power of the dollar due to present and predicted future inflationary trends, creates inconsistent holdings by different circuits as well as a reversal of the Fifth Circuit of prior opinions.

In its original opinion herein, pursuant to *Cunningham v. Bay Drilling Company*, 421 F.2d 1398 (5th Cir. 1970), the Fifth Circuit affirmed the District Court in its award of a two percent adjustment in loss of future earnings of the decedent, based on the anticipated annual increase in the cost of living (480 F.2d 11, 28). Subsequently, in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236 (5th Cir. 1975), the earlier decisions in *Cunningham* and *Canal Barge, supra.*, were expressly overruled. The rationalization advised for the position in *Johnson* is predicated upon the speculative nature of such awards. This reasoning, however, totally ignores the fact that damages in any personal injury or wrongful death action are by their very nature speculative. *Petition of Risdal and Anderson, Inc.*, 291 F.Supp. 353 (D. Mass. 1968). In fact, there may be less speculation involved in computing the trend of the American dollar than there is in estimating the life expectancy or work-life expectancy of an injured plaintiff, a common practice for many years in personal injury actions.

Nor can the decision in *Johnson, supra.*, couched in terms of judicial aversion to speculation, be reconciled with other decisions to the effect that consideration may be directed to the possibility of inflation in fixing damages. *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1959), certiorari denied 361 U.S. 885, 80 S.Ct. 157 (1959); *New Amsterdam Casualty Company*

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v. Soileau, 167 F.2d 767 (5th Cir. 1948), certiorari denied 335 U.S. 822, 69 S.Ct. 45 (1948); *Cox v. Remillard*, 237 F.2d 909 (9th Cir. 1956); *Grigsby v. Coastal Marine Services of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), certiorari dismissed 396 U.S. 1033, 90 S.Ct. 612 (1970); *Law v. Sea Drilling Company*, No. 67-794 (E.D. La. 1970). In fact, the jurisprudential allowance of consideration of future inflationary trends by both judge and jury is well entrenched.

Moreover, *Johnson's* reliance on *Chesapeake & Ohio Railway Company v. Kelly*, 241 U.S. 485, 36 S.Ct. 630 (1916) and *Blue v. Western Railway of Alabama*, 469 F.2d 487 (5th Cir. 1972), is subject to question in view of their primary concern with the discount of future earnings to present worth. Neither case expressly addresses problems relating to future inflationary trends.

The rationale of *Johnson* is further weakened as a result of its reliance on *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970), *Frankel v. Heym*, 321 F.Supp. 1331 (E.D. Penn. 1970), affirmed 466 F.2d 1226 (3rd Cir. 1972) and *Furumizo v. United States*, 245 F.Supp. 981 (D. Hawaii 1965), affirmed 381 F.2d 965 (9th Cir. 1967). These cases, when read in light of the foregoing jurisprudence, actually would seem to point up the conflicting views adopted at various periods, both within and among the Appellate Courts in reference to allowance for future inflationary trends. (See *Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974))

That this question is subject to genuine controversy which should be addressed by this Honorable Court is clearly revealed by the divided Court in *Johnson*, with

particular reference to the dissent indicated by Chief Judge John R. Brown. It is respectfully submitted that prediction of future inflationary trends, speculative though it may be, is no more so than other elements of a personal injury damage award and is just one more factor to be considered in estimating, in the interest of justice, present awards of future dollars. In the words of Flemming James, Jr., "There are few who do not regard some degree of continuing inflation as here to stay." Harper and James, *The Law of Torts*, 1968 Supp. § 25.11.

IV.

Reduction Of Award For Decedent's Personal Use

The "pecuniary loss" of Mary Kathryn Griffith and those on whose behalf she has brought this action, resulting from the death of her husband, is to be determined by the extent to which they would have shared in his earnings had he lived. *Meehan v. Central Railroad Company of New Jersey*, 181 F.Supp. 594 (S.D. N.Y. 1960); *O'Connor v. United States*, 269 F.2d 578 (2nd Cir. 1959); *Petition of Marina Mercante*, 248 F.Supp. 15 (S.D. N.Y. 1965). Customarily, this figure is determined by deducting the deceased's share of household expenses, etc., from gross earnings, expressing his share as a percentage. Thus, for example, with three children in the home, the percentage has been placed at twenty-five percent, *Petition of Marina Mercante, supra;* with two children, twenty-three percent, *Rogow v. United States*, 173 F.Supp. 547 (S.D. N.Y. 1959); eighteen percent with four children,

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Jennings v. United States, 178 F.Supp. 516 (D. Md. 1959) and fifteen percent with two children, *Law v. Sea Drilling Company*, *supra*.

Petitioner contends that the Trial Court erred in assessing twenty-five percent of the earnings of the deceased, George L. Griffith, to his consumption had he lived. Due to the nature of the deceased's work as a riverboat pilot, he worked two of every three days aboard the boats to which he was assigned. He received his meals, lodging and ironing aboard the boat, without any additional cost to him, where his opportunity to spend for his own entertainment was limited. His widow, minor son, major daughter and grandchild shared his home. For these reasons, it is urged that a more appropriate assessment would have been in the amount of fiteen percent and that the award of the Trial Court should be increased by the difference. A fifteen percent deduction attributable to decedent's use would clearly be in line with the rationale of *Higginbotham v. Mobil Oil Corporation*, 360 F.Supp. 1140 (W.D. La. 1973) and *Law v. Sea Drilling*, *supra*.

CONCLUSION

In view of the foregoing arguments and authorities, it is respectfully urged that this petitioner's application for writ of certiorari be granted and, upon review, that the decision of the Fifth Circuit Court of Appeals be reversed only with respect to the following:

A. That Court's finding of negligence, and proximate causation, on the part of George L. Griffith;

B. That Court's refusal to allow the increment of damages in the amount of two percent annually;

C. That Court's refusal to reduce the allocation of twenty-five percent of the decedent's future income to his personal use, had he lived.

Respectfully submitted,

HARRY E. BARSH, JR.
Camp, Carmouche, Palmer,
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P.O. Drawer 2001
Lake Charles, Louisiana 70601

Counsel for Petitioner,
Mary Kathryn Griffith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for a Writ of Certiorari on behalf of the Petitioner, Mary Kathryn Griffith, have been served on all parties by depositing same in United States Mail, postage prepaid, and addressed to their respective counsel of record.

LAKE CHARLES, LOUISIANA; June ____, 1975.

HARRY E. BARSH, JR.

ENTRY OF APPEARANCE

To the Clerk of the United States Supreme Court:

In accordance with Rule 33 of this Honorable Court, please enter my appearance in this action as attorney for Petitioner, Mary Kathryn Griffith.

Dated: June ___, 1975.

HARRY E. BARSH, JR.
Camp, Carmouche, Palmer,
Carwile & Barsh
P.O. Drawer 2001
Lake Charles, Louisiana 70601

Attorneys for Petitioner

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APPENDIX

MEMORANDUM OPINION

In The United States District Court
For The Northern District Of Mississippi
Greenville Division

IN THE MATTER OF THE PETITION OF CANAL BARGE COMPANY, INC., AS OWNER AND OPERATOR OF THE M/V ELAINE JONES, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

NO. GC6948-K

On October 14, 1969, at approximately 12:20 p.m., a collision occurred between the M/V ELAINE JONES and the Eads Bridge, a fixed structure spanning the Mississippi River at St. Louis, Missouri, and connecting East St. Louis with the City of St. Louis. The collision resulted in damages to the bridge, the ELAINE JONES, and the death of the pilot, George L. Griffith.

Three days later — on October 17, the towboat owner and operator, Canal Barge Company, Inc. (Canal) filed in this court its petition seeking exoneration from and/or limitation of liability for the collision losses and posted ad interim stipulation (as amended) of $807,453.78 as the limitation value of the ELAINE JONES and its pending freight. Answers and claims were timely filed on behalf of (a) Mary Kathryn Griffith, administratrix of the estate of George L. Griffith, (b) St. Louis Bridge Company (Bridge Company) and Terminal Railroad Association of St. Louis (Terminal), jointly as owner and operator respectively of Eads Bridge, (c) St. Louis Fuel and Supply Company,

Inc., and (d) Fort Gage, Inc. These answers not only denied that Canal was entitled to exoneration from fault in the collision but also contested its right to limit liability. The claims as propounded sought money recovery from Canal for the death of the pilot Griffith, for collision damages, including losses in revenues, to the Eads Bridge, and for the minor property damage sustained by the other two claimants. Thereupon Canal counterclaimed against the Griffith estate asserting, in the alternative, that the deceased pilot's negligence contributed to the casualty.

An evidentiary hearing requiring seven days was concluded on December 8, 1970. After due consideration of the oral and documentary evidence the Court makes the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

BACKGROUND DATA ON M/V ELAINE JONES AND EADS BRIDGE

1. The ELAINE JONES is a twin screw, diesel-powered towboat constructed of steel with a Hydrodyne hull owned and operated by Canal. Built in 1967 by St. Louis Shipbuilding Company, it is a documented vessel of the United States bearing Official Number 506770 of 597 gross tons with a length of 154 feet, breadth 40 feet, depth 11 feet, draft 8 feet, approximately 5300 horsepower, and equipped with kort nozzles. The towboat was fully certificated by the United States Coast Guard and also by American Bureau of Shipping. At the times relevant, the vessel's

equipment was completely operational; and in addition to pilot Griffith, her crew consisted of the captain, Vernon E. Stroschein, two engineers, a mate and a relief mate, two deckhands, a tankerman, and a cook. Incorporated under Louisiana law with its principal office in New Orleans, Canal owns and operates a fleet of 15 towboats as well as numerous barges on the various inland waterways.

2. The Eads Bridge is owned by St. Louis Bridge Company, which is a wholly-owned subsidiary of Terminal; and for many years the bridge has been leased to and operated by Terminal. The construction of Eads Bridge in its present location in St. Louis Harbor was completed in 1874. The bridge was constructed with three spans supported by two piers positioned in the bed of the river, one pier on the Missouri shore and one pier on the Illinois shore. The center, or channel, span of the bridge is 520 feet in width and the two supporting piers are 518 feet apart at the city directrix level, a fixed reference point based on the high-water mark for the year 1826. The east and west spans are each 502 feet in width. The bridge is an arched structure with the center of each span being the highest point above the river. The lowest point at the center of the channel span is 55.72 feet above the city directrix; this clearance reduces to 8.32 feet at the pier ends of the center span. Eads Bridge has two decks, the upper deck to accommodate motor vehicles and pedestrians and the lower deck for movement of trains. The superstructure of the bridge is below the vehicular deck level rather than above it and thus presents an arch passageway for vessels traveling through and under it. Prior to the collision in suit, the bridge had

never sustained any known damage by contact with waterborne craft, nor had it been declared an unreasonable obstruction to navigation by governmental authority.

NAVIGATION CONDITIONS IN ST. LOUIS HARBOR

3. St. Louis Harbor, the site of this accident, because of the presence of six river bridges, their close proximity and construction, coupled with the meander of the river and its currents, enjoys a reputation among river people of being a difficult area or passage to safely navigate, particularly in high water. A vessel southbound, as was the ELAINE JONES, after departing Lock 27, is first confronted with the Merchants Bridge (Mile 183), and then the McKinley Bridge (Miles 182.5), which present limited horizontal clearance. Immediately after passing the McKinley Bridge, the vessel must line up for safe passage of the Veterans Bridge (Miles 180.2) and then the Eads Bridge (Miles 180). Just downriver from the Eads Bridge are the Poplar Street Bridge (Mile 179.3) and the MacArthur Bridge, also known as the "City" bridge (Miles 179). For southbound traffic, a gradual bend in the river from left to right occurs above the Veterans Bridge and extends to below the MacArthur Bridge. Contributing to the navigation problem is the presence of Eads Bridge which, due to its arched construction, affords a limited amount of clearance in high water through which vessels can safely pass. Also, during high water, i.e., 20 feet or more on the St. Louis gauge, the current immediately above Veterans Bridge runs from the right descending bank to the left descending bank, from the Missouri shore

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toward the Illinois shore. This high water current condition, called a lefthand "set" or "draft", has a pronounced effect of moving a southbound boat and tow toward the Illinois bank rather than straight ahead. These navigation conditions exist whenever the river is at 20 feet or more on the St. Louis gauge and are facts known to experienced mariners navigating towboats through that section of the Mississippi River.

4. The Veterans Bridge, which is only .2 of a mile north of Eads Bridge, is so constructed that it has but one pier situated in the river bed, which pier is substantially in line with the left descending pier of the center, or channel, span of the Eads Bridge. Thus a downbound vessel and its tow must be shaped up to run both the Missouri, or channel, span of the Veterans Bridge and the center, or channel, span of the Eads Bridge when the head of the tow is no closer than one-half mile above the Veterans Bridge. A vessel and its tow accomplish safe passage only when they pass under both bridges directly in line with the green navigational lights affixed to the center spans of each structure.

5. The river at St. Louis Harbor reaches flood stage at 30 feet, a condition which periodically occurs. On October 14, the date of the collision, the river stage was 30.3 feet; This flood stage was the result of a sudden and unexpected rise of an unprecedented rapidity occasioned by heavy rainfall. For example, harbor gauge readings for the 5-day period were as follows:

October 10	3.2 feet
October 11	5.2 feet
October 12	14.1 feet
October 13	25.8 feet
October 14	30.3 feet

As the river stage exceeds 20 feet, the force of the aforementioned set to the left above Veterans Bridge likewise increases; and also as the rate of rise in the river accelerates, the force of the set becomes more violent. Although a sudden rise of the river increases the severity of the set, this is an operating factor known to persons experienced in navigating St. Louis Harbor during high water. Moreover, the experienced navigator of a downbound vessel can reasonably predict the severity of current in St. Louis Harbor by observing upriver conditions at Wood River, Illinois, and water levels at Lock 27.

6. The above left set or cross-current is not encountered by downbound vessels except in high water. At all other times the current in the immediate area runs straight down the river. When navigating the harbor downbound in low water (10 feet or less), it is an acceptable practice for a vessel to approach the Veterans and Eads Bridges in line with their green lights and pass under both along the mid-channel sailing line, as depicted on the U.S. Engineers' official chart (Ex. 13). See App. A. This sailing line is the normal low water configuration for passage of a descending vessel. When navigating the harbor downbound in high water, it is the commonly accepted practice, in order to compensate for the left hand set encountered just above Veterans Bridge, to approach Veterans Bridge well to the right of the mid-channel sailing

line, or favoring the Missouri shore. By this means, the vessel and tow are not forced by the cross-current to the left of the mid-channel sailing line, as it runs immediately beneath both the Veterans and Eads Bridges. Thus, a downbound vessel and tow that in high water approach the Veterans and Eads Bridges within one-quarter of a mile north of Veterans Bridge on the mid-channel sailing line are too wide or "out of shape" to safely navigate the passage beneath the two bridges.

THE VOYAGE OF THE ELAINE JONES PRIOR TO ACCIDENT

7. On September 29, 1969, Vernon Stroschein was assigned as pilot aboard the ELAINE JONES, relieving her regular captain. On October 7, George Griffith boarded the vessel at Memphis, relieving the regular relief captain. Stroschein became the captain and stood watch from 6 a.m. to noon and 6 p.m. to midnight; Griffith became the pilot, standing watch from noon to 6 p.m. and midnight to 6 a.m. While both Stroschein and Griffith were Canal's regularly employed wheelhouse personnel, this was the first time that either had ever served aboard the ELAINE JONES. On October 9, the ELAINE JONES passed northbound through the St. Louis Harbor when the river gauge was 4.7 feet. Continuing north, the vessel went through Lock 27 (Mile 185), which is approximately five miles north of the Eads Bridge, and also through Lock 26 (Mile 203), before entering the Illinois River.

8. On October 12 the ELAINE JONES exchanged her tow with Canal's M/V LEONIDAS POLK at ap-

proximately 10:25 a.m. at Mile Post 261 on the Illinois River. This tow exchange was a customary procedure for Canal, which operates integrated tows by utilizing its power vessels where most needed. At this exchange the ELAINE JONES picked up seven empty barges from the LEONIDAS POLK. Following the exchange, Griffith stood his regular watch on October 13 from noon to 6 p.m., and he again assumed control on his regular watch from midnight October 13 to 6 a.m. October 14.

9. The ELAINE JONES then proceeded downriver with the seven empty barges, arriving at Wood River, Illinois, at approximately 5:40 a.m. on October 14. At Wood River, which is about 20 miles upriver from St. Louis, the ELAINE JONES added three barges to the seven empties already in tow, two of the added barges, NBC-883 and S-1, being loaded. The tow of ten barges, as rearranged, was made up two wide and five long, with the two loaded barges being the aftmost two barges in the port string. The towboat was made up astern the NBC-883, the port stern barge in the tow. The flotilla was 100 feet wide, 1050 feet long on the port string and 900 feet long on the starboard string, which was a normal and customary arrangement. The same morning the ELAINE JONES departed Wood River at 9:45 a.m. enroute to Lock 27 with Captain Stroschein at the controls. At 11:25 a.m. it arrived at Lock 27, from which it departed at 11:50 a.m.

10. During the ELAINE JONES' southbound voyage from Wood River to Lock 27, Captain Stroschein and Pilot Griffith were aware that the river at St. Louis Harbor was at flood stage and that it had risen at an extraordinarily rapid rate during the

preceding several days. River information was readily available to them at the locks and also by radio with other vessels operating in the immediate area.

11. Canal maintains a shore facility at Natchez, Mississippi, which has twice-daily radio contact with its various vessels, including the ELAINE JONES. Discussions regularly take place between operating wheelhouse personnel and Canal's marine superintendent and port captain. During the period October 11-14 when the ELAINE JONES was operating just above St. Louis harbor several other Canal vessels, in daily radio communication with Canal's supervisory personnel at Natchez, were also in the vicinity of the St. Louis Harbor. Prior to the time of the collision, Canal's port captain, Earl Daily, was aware of the flood stage at St. Louis Harbor and the unusual rise in the river in that area.

12. At 11:45 a.m., just prior to departing Lock 27, Pilot Griffith came on watch to relieve Captain Stroschein. While employed by Canal, Griffith had never piloted any of its vessels southbound through St. Louis Harbor at flood stage or even in high water. Stroschein, however, had encountered the left set just above the Veterans Bridge in his previous experience, but did not communicate this information to Griffith, nor did he issue any instructions to the pilot for navigating the harbor under the known conditions. After briefly discussing with the pilot the tendency of the tow to have a starboard drag, Captain Stroschein left the wheelhouse and went to the galley for his noon meal.

APPROACH TO BRIDGES AND COLLISION

13. At 12:10 p.m. Captain Stroschein returned to the wheelhouse and noted that the tow had already passed the Merchants and McKinley Bridges and the head of the tow was approximately halfway between the McKinley Bridge (Mile 182.5) and the Veterans Bridge (Mile 180.2), or in excess of one mile above the Veterans Bridge (point x on Ex. 13). At this moment the ELAINE JONES and her tow were lined up with the green lights of the center span of the Veterans Bridge, which lights are aligned, or nearly so, with the navigation lights on the Eads Bridge; with this heading both the vessel and her tow were lined up on the mid-channel sailing line. Observing this condition, Captain Stroschein made no criticism or comment to Pilot Griffith upon the manner in which he was making his approach to the bridges. The captain neither informed Griffith of the left set to be encountered ahead, nor assumed command of the vessel. From about one-half mile north of Veterans Bridge, Griffith made a down-bound approach too wide to safely navigate the bridges ahead. Pilot Griffith continued on the mid-channel sailing line until the head of the tow reached about one-quarter mile north of Veterans Bridge (point y on Ex. 13), where the head of the tow and the stern of the vessel were still lined up with the green lights on the Veterans and Eads Bridges. At this point the left hand set in the river was encountered, causing the vessel and her entire tow to slide or be pushed violently to the left and off the mid-channel sailing line. The new heading of the flotilla, which was then moving full speed ahead and at an overland rate of about 12 mph, was away from the center span of the Eads Bridge and toward the river (or left descending

channel) pier of the Veterans Bridge. It was only when the vessel was about 100 feet above the Veterans Bridge that Captain Stroschein, according to his testimony, first became alarmed.

14. In an attempt to overcome the set to port, Pilot Griffith steered hard to starboard, which moved the head of the tow to the Missouri shore and caused the stern of the vessel to swing in the opposite direction, or toward the Illinois shore. As the vessel neared the river pier of the Veterans Bridge, the pilot then steered to port in an attempt to swing the ELAINE JONES to the right toward the middle of the channel. The pilot's efforts to regain a safe course were unsuccessful, for the port side of the ELAINE JONES, about 20 feet forward of her stern, bumped against the river pier of the Veterans Bridge. At this point the head of the tow was almost at the Eads Bridge and the vessel's wheelhouse, including radar equipment, was about 44 feet above the water line.

15. Immediately following the towboat's striking the Veterans Bridge pier, the port face wires parted, the tow went out of control and jackknifed with its head swinging toward the Missouri shore at a 45° angle to the mid-sailing line; but the tow remained fixed to the vessel by the starboard wires. The pilot, realizing that a collision was imminent with the left descending pier of the center span of the Eads Bridge, shifted the vessel's engines from full ahead to full astern, to prevent the vessel from colliding directly with the left descending pier of the Eads Bridge. Captain Stroschein, who had remained in the wheelhouse, realized at once that the tow was out of control and would probably collide with the left descending pier of

the Eads Bridge if the engines were not reversed, as the pilot was then doing. Stroschein soon realized, however, that even if the engines were reversed, some portion of the tow or vessel would inevitably collide with the Eads Bridge. Consequently, the captain abandoned the wheelhouse, leaving the pilot Griffith behind to maneuver the vessel off the left descending pier of the Eads Bridge toward which it was rapidly moving.

16. Only seconds thereafter the wheelhouse struck the bottom portion of the Eads Bridge arch at a point about 50 feet west of the left descending pier and 20 feet above the city directrix level. As a result of this collision, the wheelhouse of the ELAINE JONES was demolished and a section or chord of the bridge knocked out. Immediately prior to the impact, Pilot Griffith left the wheelhouse, but it was then too late, for he was crushed by falling metal and instantly killed. Not more than a minute elapsed between the time the ELAINE JONES rubbed the Veterans pier and its wheelhouse was demolished by striking the arch of the Eads Bridge.

17. The ELAINE JONES could have safely navigated the Veterans and Eads Bridges had her downriver approach been closer to the Missouri shore so as to compensate for the left hand set encountered just above the Veterans Bridge, which set was predictable when the St. Louis gauge stood at flood stage. On the day before and on the day of the accident, various other downbound towboats of the same and lesser horsepower and size tow encountered the same current conditions, and they safely navigated the St. Louis Harbor.

COMPETENCY OF WHEELHOUSE PERSONNEL

18. Captain Stroschein, age 36, was initially employed by Canal in 1958. After serving as tankerman and mate, he had several years' experience piloting six of Canal's towboats. Although he had served as pilot on both the M/V EUGENIA P. JONES and the M/V LEONIDAS POLK, 4300 horsepower each, his regular employment was as master of the M/V CAROLINE, an 1800 horsepower vessel. When he boarded the ELAINE JONES on September 29, 1969, it was Stroschein's first trip on that towboat, and he shared watches with the vessel's master, Captain Lay, until the latter debarked at Memphis on October 7, when Griffith came aboard to act as his pilot and stand the after watch. Stroschein had had no prior service with Griffith on any of Canal's vessels. At Wood River, Illinois, the captain was on watch when the tow was made up, and Griffith did not participate in its arrangement. The captain decided to navigate to St. Louis and on his watch, enroute to Lock 27 at slow speed, he did not encounter any abnormal movement of the tow. When taking the controls in the lock at 11:45, Griffith asked the captain about the possibility of a starboard drag because of the tow's makeup. The captain then advised him that if such a drag developed at full speed, Griffith should make a port steer to compensate for it but that it was up to him, the pilot, to decide how much steer was in order after getting the feel of the tow. Captain Stroschein knew that it would take Griffith, who was generally familiar with the barges and the tow, a period of some minutes, after the ELAINE JONES got under way at full speed ahead, to make this determination. From his prior experience Captain Stroschein was aware that a left set just above

the Veterans Bridge might be encountered in extremely high water and the force of the cross-current could slide a tow toward the Illinois shore. He also knew that a downbound vessel and her tow had to be shaped up for safe passage beneath the Veterans and Eads Bridges at least one-half mile north of Veterans Bridge; and he further knew if at that point the flotilla was too far from the Missouri shore, navigation ahead would be imperiled by the limited clearance afforded by the arches of the Eads Bridge in high water, which necessitated passage directly under the middle of the center span of Eads Bridge.

19. George Griffith, 47 years of age, was first employed by Canal in January 1968 after seven years' experience piloting vessels of other towing companies on various rivers, including the Mississippi River. He was regularly assigned as pilot to the M/V JOSEPH M. JONES, a 4300 horsepower vessel which was a sister ship of the ELAINE JONES, both having the same dimensions. Griffith had also piloted five other Canal towboats, including the LEONIDAS POLK. He had piloted the JOSEPH M. JONES southbound through the St. Louis Harbor on at least four different trips: September 13, October 27, November 14, 1968, and July 23, 1969, and was off watch on a fifth trip, March 4, 1969. The evidence does not reveal that on any of these occasions high water conditions existed at the St. Louis Harbor. When taking the controls from Captain Stroschein at Lock 27, Griffith knew of the high water condition at St. Louis Harbor, that Eads Bridge had only limited clearance, making it necessary to pass beneath the center of the Eads channel span, but he did not know of a left hand set to be encountered directly above the Veterans Bridge, nor was

he apprised of its probable existence by Captain Stroschein or Canal's other supervisory personnel. Moreover, when he assumed control at Lock 27, Griffith had inadequate time to get the feel of the tow or otherwise check its steerage before getting too wide in the navigation course, and without warning he held to that course until the set slid the flotilla to port. Griffith then attempted to correct the course by steering first to starboard and then to port to avoid striking the Veterans pier. Out of shape for navigating Eads Bridge, the pilot's maneuvers to extricate the vessel and tow from their plight were procedures that an experienced mariner would resort to in such an emergency.

20. Earl Daily, Canal's shore-based port captain, assigned Stroschein and Griffith to their respective positions on the ELAINE JONES. Familiar with the capabilities and records of both men, he knew that they had neither crewed together nor had prior service on the ELAINE JONES. A veteran river pilot himself, Captain Daily also knew that whenever the river stage at St. Louis Harbor exceeded 22 feet, the left set above the Veterans Bridge should be expected and, given that condition, a vessel descending too wide from the Missouri shore would have trouble shaping up to run the bridges. Although Captain Daily was in twice-daily communication with the ELAINE JONES and was fully aware of her movements, he issued no particular instructions to Stroschein or Griffith for navigating the harbor. Canal, through its port captain, was privy to the perils of the navigation.

DAMAGES CAUSED BY COLLISION

Death Claim of the Administratrix.

21. At the time of his death, George Griffith had been married to Mary Kathryn Griffith since September 10, 1945, and they had lived together until his death. The widow is 46 years of age, in good health and has a life expectancy of 33.2 years. Four children were born of their marriage, namely: Sharon Ann, on June 20, 1946; Guy Rocklyn, on January 13, 1948; Dixie Lea, on January 29, 1953; and Dusty Lane, on September 17, 1954. Decedent resided in Timbo, Arkansas, sharing his household with his wife, their 15 year-old son, Dusty Lane, and their 22 year-old daughter, Sharon Ann, and her small child. The adult daughter, Sharon Ann Griffith Robique, worked at a shirt factory and received an allotment from her estranged husband, who was in the military service, but she and her small child were furnished food and lodging by Griffith. The other two children, Guy Rocklyn and Dixie Lea, were married, self-supporting, and maintained their own households elsewhere.

22. His death being instantaneous, Griffith had no conscious pain and suffering, and his funeral expenses of $3,000 have been paid by Canal.

21. At the time of his death, Griffith was in good health and had a work-life expectancy of 16.4 years from date of trial. Griffith had a stable and regular employment as a river pilot, and the last year of his life his earnings, projected over a 12-month period, amounted to $11,321. His loss of wages accrued to date of trial is $12,376. Decedent's future loss of income is to

be calculated at $11,321 per year for his 16.4 years' work-life expectancy, and discounted at a reasonable rate of 4%; this sum amounts to $134,240. Griffith might have reasonably anticipated certain increases in his future earnings; such increases may fairly be calculated at the rate of 2% per year to the end of his work-life expectancy, which is to be also discounted at 4%. Thus an additional loss of future income is derived in the sum of $20,522.

22. About 25% of his income, or about $250 monthly, was used by decedent for his personal needs and purposes, and that percentage is a fair and reasonable apportionment of Griffith's total income attributable to his personal use had he survived.

23. The pecuniary loss to Mary Kathryn Griffith, widow, and Dusty Lane Griffith and Sharon Ann Griffith Robique, dependent children, is as follows:

Loss of wages to date of trial	$ 12,376
Future loss of income	134,240
Future loss of increased earnings	20,522
	167,138
Less 25% attributable to decedent's personal use	41,784
Total allowable loss	125,354
Distributable as follows:	
Mary Kathryn Griffith	89,354
Dusty Lane Griffith (6 years during minority at $250 monthly)	18,000
Sharon Ann Griffith Robique (10 years at $150 monthly)	18,000

24. Griffith provided the guidance, care and discipline of a good father to Dusty Lane Griffith, the only minor child residing in the household. By reason of his father's death, this minor child has sustained, and during his minority will continue to sustain, further loss from the lack of his father's care, guidance and discipline. This item of damage is assessed at the rate of $1,200 per year for six years, or $7,200.

25. The above enumerated elements constitute the damages allowable to the administratrix in this action. If the applicable law authorized an award of general damages, the court, in such case, would find that the decedent and his wife were happily married for many years, and close and affectionate ties existed between him and his four children. Each member of his surviving family has sustained loss from being deprived of his love and affection, companionship and society, fixed as follows:

Mary Kathryn Griffith	$ 20,000
Sharon Ann Griffith Robique	10,000
Guy Rocklyn Griffith	10,000
Dixie Lea Griffith	10,000
Dusty Lane Griffith	10,000

making a total of $60,000 general damages.

THE JOINT CLAIMS OF BRIDGE COMPANY AND TERMINAL FOR PROPERTY DAMAGE AND REVENUE LOSSES.

26. Immediately following the collision, Terminal closed Eads Bridge to both vehicular and rail traffic. Two days later, two of the four vehicular lanes were re-

opened allowing highway traffic in both directions. Rail traffic was not resumed until all bridge damage had been repaired. On June 15, 1970, all traffic, both rail and vehicular, returned to normal.

27. After having its own personnel inspect the bridge's structural damage, Terminal engaged Sverdrup and Parcel, a firm of consulting engineers, to perform the necessary engineering services and contracted with American Bridge, Division of U. S. Steel, to fabricate the needed repair components. The process of bridge repair was complex, requiring the jacking of the entire structure to insert missing parts, but the work was performed with dispatch. The work done under these contractual arrangements was necessary to restore the bridge to its condition immediately preceding the accident. The repairs made neither enhanced the bridge's value nor extended its useful life.

28. The entire cost of the original bridge structure, because of its age, had been fully depreciated on Terminal's books in accordance with depreciation rates prescribed by the Interstate Commerce Commission. At the time of the collision, however, the bridge was in sound condition and had a remaining useful life for an indefinite number of years. The actual value of the bridge is very substantial, Terminal having declined in recent years various offers to purchase the bridge at cash offers ranging from $11 million to $15 million, plus other considerations. Eads Bridge is of very great value to Terminal because it constitutes an integral part of its business operations, and is important to the needs of various proprietary railroad companies which own 100% of Terminal's stock.

29. Terminal paid Sverdrup and Parcel $50,822.58 for their engineering service, and American Bridge $191,772.57 for its work. These charges were fair and reasonable in amount and constituted service and work necessarily incurred because of collision damage. Terminal also incurred reasonable expenses of $10,592.61, itemized in the evidence, for miscellaneous items connected with the collision damage. The total amount of structural and incidental damage to the Eads Bridge exclusive of revenue loss, which proximately resulted from the collision, is determined to be the sum of $253,187.76.

30. Terminal is a switching or terminal line railroad which serves, although in a different manner, both freight and passenger trains of certain operating railroads arriving and departing the St. Louis area. Basically Terminal's service function is to move its customers' rail cars and engines across the Mississippi River in accordance with established routing procedures. Besides the Eads Bridge, Terminal owns the Merchants Bridge, which is located three miles upriver, rail trackage and yards on both sides of the river at St. Louis, and Union Station, the St. Louis passenger terminal. In its normal operations, Terminal regularly uses not only its Eads and Merchants Bridges but also the MacArthur Bridge owned by the City of St. Louis, which charges Terminal tolls for all crossings over it. The MacArthur Bridge is located immediately downriver from and convenient to Eads Bridge. During the 8-month period of bridge repair, Terminal, in its use of MacArthur Bridge, incurred additional expenses in city bridge tolls and from furnishing to passenger trains qualified pilots or switchmen as required by the City. In addition to certain in-

creased operating costs, Terminal sustained a direct loss of revenue for charges it would otherwise make to its own railroad customers for crossing Eads Bridge. The nature of the services and the amount of charges made by Terminal differ for freight trains and passenger trains, and it is necessary to determine the losses of each category.

31. Terminal receives freight cars from railroad customers in its various classification yards situated in or near St. Louis on both sides of the river and it arranges such cars according to size and destination. Once classified, incoming freight cars are delivered by Terminal's own engines and crews. Terminal's transriver freight movements originate from various classification yards, principally Central District (C. D.) and Madison Yards, which are on the Illinois side, and several classification yards, chiefly Mill Creek Valley, situated in Missouri. C. D. Yard is located near Eads Bridge, and directly west of Eads Bridge is Mill Creek Valley, which is in downtown St. Louis. C. D. has always primarily served the trans-river freight entering St. Louis from the east for delivery to Mill Creek Valley, and Eads Bridge is the shortest and most convenient route from C. D. to Mill Creek Valley. The nearby city-owned MacArthur Bridge, to which C. D. Yard also has easy access, is the next shortest and most convenient route for traffic moving between C. D. and Mill Creek Valley. The other principal eastside yard, Madison, is located several miles north of Eads Bridge and close to Merchants Bridge, and trans-river traffic originating in that yard, which is of great volume, is sent across Merchants Bridge. The bulk of the freight traffic in the St. Louis area moves westwardly, from Illinois to Missouri.

32. The railroad deck of the Eads Bridge leads into a tunnel on the west side of the river which somewhat restricts its use by oversize or jumbo freight cars and larger locomotives. When oversize freight cars westbound are received in C. D. Yard, they are moved across Merchants Bridge or MacArthur Bridge, depending upon destination and traffic conditions. Since Terminal had to pay tolls for using the MacArthur Bridge, Terminal had standing instructions to its personnel to use Merchants Bridge as much as possible. On many occasions, however, Terminal, in the course of ordinary operations, chose to move larger freight cars over the MacArthur Bridge when there existed traffic congestion from C. D. to Merchants Bridge or other trackage considerations. Long prior to the Eads Bridge damage, Terminal made frequent use of the MacArthur Bridge for certain C. D. westbound freight traffic, and the volume of jumbo freight cars has actually increased for the last decade or more. A considerable portion of Terminal's trackage and switching facilities in the eastside yards is primarily employed to handle non-river moves between C. D., Madison, and other yards and serve Illinois-based industrial establishments. When the Eads Bridge was shut down, Terminal's eastside trackage and rail facilities were inadequate to meet the requirements of its non-river business and also move all its freight volume across the river via Merchants Bridge. Of necessity, Terminal was forced to use the MacArthur Bridge in order to maintain an orderly operation.

33. Terminal maintained a three-bridge daily report showing its use of the Eads, Merchants and MacArthur Bridges, and prior to October 14, 1968, Terminal's actual use of the Eads Bridge for freight traffic

was substantial. For example, between October 15, 1968 through June 15, 1969, the identical period one-year preceding the bridge closing, Terminal sent across Eads 1203 loaded freight engines, 21,496 loaded freight cars and 9187 empty freight cars; and for the 8-month period immediately preceding its closing, Eads was crossed by 1541 loaded freight engines, 26,083 loaded freight cars and 12,658 freight empties. During the months Eads Bridge was closed, 1214 loaded freight engines, 20,499 loaded freight cars and 10,032 empty freight cars would, except for the shutdown, have been sent across Eads Bridge and were, necessarily and in the course of orderly operations, sent across the MacArthur Bridge. Each day Eads movements were physically classified in the yards and designated as such on Terminal's basic records. From an operating standpoint, it was neither practicable nor economically feasible for Merchants Bridge to handle this additional volume.

34. For its freight car service of classifying, hauling and delivery, Terminal charged its customers a fixed tariff of approximately $33 per car and it might elect which bridge to use for the river crossing. When MacArthur Bridge was used, the City tolls were absorbed by Terminal and not passed on to its customers. These City tolls during the period in issue were $4.84 per engine (loaded or light), $2.32 per loaded freight car, and $1.21 per excess (of those moving in opposite direction) empty freight car. Hence, while Eads Bridge was closed, Terminal incurred City toll charges for Eads movements as follows:

1,214 loaded engines at $4.84	$ 5,875.76
20,499 loaded freight cars at $2.32	49,607.58
5,108 excess empties at $1.21	6,180.68
Total	$61,664.02

Terminal's records are sufficiently definite to support the foregoing element of loss, which is supported by Terminal's operating experience prior to the closing of Eads Bridge. Tolls paid for 1594 light engines, or those without cars, are disallowed because that number represented all light engines crossing MacArthur Bridge and Terminal failed to establish how many light engines were attributable to Eads traffic. Terminal's use of locomotives prohibited on the Eads Bridge but not on the MacArthur Bridge, however, does not detract from the validity of this portion of the claim since the undisputed evidence shows that freight cars classified for an Eads Bridge crossing were then moved by the most available engine. Terminal's claim for reimbursement of freight tolls paid to the City does not include any movements which could have practicably used the Merchants Bridge.

35. As regards passenger service, three passenger lines, viz: the L & N, the B & O, and Penn Central, customarily crossed the Mississippi River via Eads Bridge, entered and departed from Union Station, where they discharged and took on passengers and mail. The Eads Bridge was used by these passenger lines which operated on a regularly scheduled basis as the shortest and most direct route into Union Station, which is in Mill Creek Valley area, and also because bridge tolls charged by Terminal for Eads crossing were substantially less than the City's passenger tolls

for MacArthur Bridge. In crossing Eads Bridge, passenger trains, unlike freight trains, continue to be operated by their own crews and powered by their own engines. During the period in issue, the City charged tolls of $4.84 per passenger locomotive and $3.63 per passenger car. Terminal's toll charges were substantially less, namely, $2.40 per passenger engine and $1.80 per passenger car, applicable to both Eads and Merchants Bridges. Besides the difference in toll rates, the City required a qualified pilot, or switchman, aboard passenger trains crossing the MacArthur Bridge, another item of expense not to be incurred if Terminal used its own bridge. Prior to the closing of the Eads Bridge, these passenger lines rarely crossed the river by either the MacArthur Bridge or the Merchants Bridge. The distance for the three passenger lines into Union Station via Merchants Bridge was approximately three times greater than that from Eads or MacArthur Bridges. Because of their fixed schedule requirements, the passenger lines could not feasibly use Merchants Bridge during the time Eads Bridge was out of order, which made it imperative that Terminal use the MacArthur Bridge.

36. By long-standing custom and mutual interpretation of its operating agreement with the proprietary lines, Terminal would absorb the higher operating costs resulting from City bridge tolls and qualified pilot expense when the MacArthur Bridge was used due to unavailability of, or interruption in, Terminal's crossing facilities; in such case the extra charges would not be passed on to the proprietary lines. Also by long-standing custom and interpretation of their operating agreement, the proprietary

lines would pay the full City bridge toll and other expense where the MacArthur Bridge had to be used despite the availability of Eads Bridge, as with larger locomotives or oversize cars.

37. During the time that the Eads Bridge was closed, a total of 3952 passenger engines and 9970 passenger cars crossed the river via MacArthur Bridge; these engines and cars would have used Eads Bridge had it been available. Terminal incurred City bridge tolls of $55,318.78, consisting of $19,127.68 for 3952 passenger engines (at $4.84) and $36,191.10 for 9970 passenger cars (at $3.63). Terminal also incurred expenses of $42,560.49 paid as wages to pilots required by the City for the MacArthur Bridge and employees' fringe benefits of $13,074.58, making a total outlay of $55,635.07 incurred by Terminal for this special purpose. Taxi fares paid for these pilots were shown, by reasonable estimate, to have increased $586.04 per month, or $4,688.32 for 8 months that the Eads Bridge was closed.

38. Terminal did not pass on to the three passenger lines any charges for pilot services, including taxi fares; yet because of cash shortages due to bridge repair payments, losses in operating revenue, and other increased expenses, Terminal billed the three passenger lines at the City bridge rate of $4.84 per engine and $3.63 per car, rather than at the lower Eads rate. The passenger lines paid these bills under protest and with Terminal's promise of future adjustment by reimbursing them for the difference of $27,887.98 in the bridge tolls. Terminal, on the basis of its agreement and custom, is obligated to reimburse the

passenger lines for their advance since use of the MacArthur Bridge was necessitated by the Eads collision damage, and not by any act of the passenger lines.

39. In addition to incurring the obligation to reimburse its passenger-line customers $27,887.98 for overpayment, Terminal lost revenue for the passenger engines and cars which could not cross Eads Bridge during the Eads Bridge shutdown. It lost $2.40 for each passenger engine and $1.80 for each passenger car forced to use the MacArthur Bridge. Thus, for the 3952 passenger engines, Terminal sustained a revenue loss of $9,484.80 and for 9970 passenger cars a loss of $17,946.00, making its total passenger revenue loss $27,430.80.

40. Terminal's claim of damage for expense and loss of revenue in connection with its passenger traffic is recapitulated as follows:

Amount Terminal is obligated to reimburse passenger lines being charged the difference between toll rates on Eads and MacArthur Bridges	27,887.98
Amounts paid to pilots (including fringe benefits) furnished by Terminal to passenger lines customers for their trains to use MacArthur Bridge	55,635.07
Taxi fares to transport pilots back and forth across river	4,688.32

Loss in tolls for passenger engines and cars unable to use Eads Bridge	27,430.80
Total	$115,642.17

41. Terminal originally contended it sustained a loss of $146,779.40 in decreased vehicular tolls but at time of trial reduced its claimed loss to $43,193.62. The Eads vehicular deck was not the only crossing for highway traffic, but it competed with Interstate 70 — Poplar Street Bridge, which was an 8-lane toll-free bridge 12 blocks south, and the previously mentioned Veterans Bridge, a 4-lane toll bridge, 2 blocks north of Eads. After the free Poplar Street Bridge opened in November 1967, the Eads vehicular revenue sharply decreased each month, and this revenue trend continued downward although in October 1968 the Eads tolls were raised from 15¢ to 25¢ per car. The Veterans car rate, however, remained at 15¢. Over the two-year period prior to the collision, the Eads vehicular traffic declined 60%, or from 900,000 to 350,000 cars monthly. From mid-October 1969 to mid-April 1970, 50,000 fewer cars monthly crossed Eads Bridge than for the same period the previous year. On April 21, 1970, down ramps on the free bridge directly into East St. Louis were opened. When this event occurred, the Eads traffic decreased another 100,000 cars monthly over the same months of the previous year. After the Eads Bridge reopened with four lanes in use, its traffic volume remained at this reduced level. Once the down ramps on the free bridge were opened, reduction in Eads traffic was attributable to the new facility which was of great convenience to commuters and not to the restriction of Eads to only two lane traffic. Accord-

ingly, Terminal's claim must be confined to the first six months of the period of bridge repair. During that time Eads' vehicular receipts were about 17% below those of the identical period for the prior year. Except for the bridge accident, this difference in receipts would not have exceeded 9.14%, upon the basis of 4-weeks operating experience immediately prior to the collision. It is reasonable to attribute the remainder of the revenue loss, or 7.82%, to the restricted operation of the vehicular deck due to the collision. To this extent, Terminal has established an allowable revenue loss in vehicular tolls of $32,943.84.

Property Damage Sustained by Other Claimants

42. St. Louis Fuel & Supply Company, Inc., the owner of WB St. Louis Fuel Boat and Barge 425, sustained property damage of $998.18 when its aforesaid craft were struck by a barge of the runaway tow of the M/V ELAINE JONES.

43. Fort Gage, Inc., owner of the M/V FORT GAGE, sustained property damage of $1,625.00 to its said vessel when it was struck by the same runaway barge.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this proceeding for limitation of shipowner's liability pursuant to 46 U.S.C. 183 et seq.

2. The defense of inevitable accident is available to a shipowner not only in case of an act of God but also where all reasonably required precautions have been

taken, and the accident nevertheless occurs. *Atkins v. Lorentzen*, 328 F. 2d 66 (5 Cir. 1964); *The Olympia*, 61 F. 120 (6 Cir. 1894). To avail itself of that defense, Canal must carry the heavy burden of proving all necessary elements by exhausting "every reasonable possibility which the circumstances admit and show that in each [it] did all that reasonable care required." *Brown & Root Marine Operators, Inc. v. Zapata Off-shore Oil Co.*, 377 F. 2d 724 (5 Cir. 1967); *Boudoin v. J. Ray McDermott & Co.*, 281 F. 2d 81 (5 Cir. 1960); *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 65 U. S. 307, 16 L. Ed. 699 (1860).

3. Where a moving vessel collides with a fixed object, there is a presumption that the moving vessel is at fault. In the absence of adequate proof to rebut it, this presumption would suffice to make a prima facie case of fault against the M/V ELAINE JONES. *The Oregon*, 185 U. S. 186, 39 L. Ed. 943 (1895); *The Victor*, 153 F. 2d 200 (5 Cir. 1946); *Brown & Root Marine Operators*, supra.

4. Canal may not exonerate the vessel merely by showing that the pilot exercised good seamanship after the danger of a collision arose, but it must also demonstrate that the pilot was in no way at fault in placing the vessel in a position where danger would probably be encountered. *Boudoin*, supra; *The Old Reliable*, 269 F. 725 (3 Cir. 1921). Otherwise stated, it is not an inevitable accident where a master proceeds carelessly on his voyage and afterwards perilous circumstances arise, when it is too late for him to avoid the accident. The master must show that he acted seasonably, that he did everything that an experienc-

ed mariner could do, adopting ordinary caution, and that the collision ensued in spite of such exertions. *Union Steamship Co.*, supra.

5. The master of the ELAINE JONES is chargeable with knowledge of all navigational conditions reasonably ascertainable by mariners experienced in navigating St. Louis Harbor during flood stage, and even if its pilot, George Griffith, did not actually know that there existed a left set above Veterans Bridge, his ignorance may not relieve Canal of fault in the collision. *Davidson Steamship Co. v. U. S.*, 205 U. S. 187, 51 L. Ed. 764 (1906); *Boudoin*, supra.

6. The fact that other vessels safely navigated St. Louis Harbor under like conditions is evidence that the ELAINE JONES and her master did not take all steps reasonably required to avoid colliding with the bridges. *Seaboard Airline R. Co. v. Pan American Petroleum & Transport Co.*, 199 F. 2d 761 (5 Cir. 1952); *The William E. Reis*, 152 F. 673 (6 Cir. 1907).

7. Applying the foregoing rules of law to the facts of this case, the court concludes that the collision between the ELAINE JONES and the Eads Bridge was not an inevitable accident but was due to the fault of the vessel, and Canal is not entitled to exoneration.

8. Canal, through its port captain, had privity or knowledge of the navigational hazards in St. Louis Harbor; and its failure to inform the master and pilot of the ELAINE JONES of such hazards was a negligent omission which proximately contributed to the collision. *Continental Ins. Co. v. Sabine Towing Co.*, 117 F. 2d 694 (5 Cir. 1941). The granting or denying

of relief by way of limitation, however, is moot by reason of the fact that the stipulated value of the vessel and freight exceeds the aggregate of all allowable claims.

9. Vernon E. Stroschein, master of the ELAINE JONES, was negligent as follows:

(a) In tendering to his pilot a tow without affording him an opportunity to get the feel of the tow before encountering unusual river conditions which the master knew were hazardous to navigate;

(b) In failing to inform his pilot of a hazard to navigation of which he had knowledge. *Davis v. Parkhill-Goodloe Co.*, 302 F. 2d 489 (5 Cir. 1962); *Pioneer S. S. Co. v. Hill*, 227 F. 2d 262 (6 Cir. 1955); *Sylve v. E. W. Gravolet Canning Co., Inc.*, 278 F. Supp. 669 (E. D. La. 1967);

(c) In failing to instruct his pilot as to the proper method of navigating St. Louis Harbor under known hazardous conditions. *Davis v. Parkhill-Goodloe Co.*, supra; *Martin v. United Fruit Co.*, 272 F. 2d 347 (2 Cir. 1959);

(d) In failing to take charge when the pilot plainly misgoverned the vessel. *Union Shipping & Trading Co. v. U. S.*, 127 F. 2d 771 (2 Cir. 1942); and

(e) In abandoning the wheelhouse of the ELAINE JONES in the face of danger. *Farmer*

v. O/S FLUFFY D., 220 F. Supp. 917 (S. D. Tex. 1963).

The foregoing negligent acts and omissions of the master of the vessel are chargeable to the shipowner and they constitute the proximate cause of the collision resulting in the death of the pilot and damage to both the Eads Bridge and other craft in the harbor.

10. The ELAINE JONES was unseaworthy in the following respects:

(a) Her master and pilot were unfit to meet the perils reasonably to be anticipated in her voyage through St. Louis Harbor. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U. S. 724, 18 L. Ed. 2d 482 (1967). See Annotation, 18 L. Ed. 2d 1497. Cf. *Usner v. Luckenbach Overseas Corp.*, S. Ct. Case 47, Slip Opinion dated January 25, 1971. *Walker v. Harris*, 335 F. 2d 185 (5 Cir. 1964), cert. den. 379 U. S. 930, 13 L. Ed. 2d 342 (1965).

(b) Her master and pilot were unequal in disposition and seamanship to the ordinary man in the calling under like circumstances. *Boudoin v. Lykes Bros. S. S. Co.*, 348 U. S. 336, 99 L. Ed. 354 (1955); *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515 (2d Cir. 1952), cert. den. 343 U. S. 966, 96 L. Ed. 1363 (1952).

The unseaworthy condition of the vessel proximately contributed to the collision and the resulting losses aforesaid.

11. Mary Kathryn Griffith, as Administratrix, has standing to sue for the claims arising from the death of George Griffith in the course of his employment as a seaman by Canal, under both the Jones Act and the general maritime law. 45 U.S.C. 51, 59; *Lindgren v. U. S.*, 281 U. S. 38, 74 L. Ed. 686 (1930); *Moragne v. States Marine Lines, Inc.*, ___ U. S. ___, 26 L. Ed. 2d 339 (1970).

12. The personal representative may recover for the actual pecuniary loss occasioned by the seaman's death. This is the measure of damages under F.E.L.A., 45 U.S.C. §51, *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417 (1913), the Jones Act, 46 U.S.C. § 688, *Neal v. Saga Shipping Co.*, 407 F. 2d 481 (5 Cir. 1969), and the Death on the High Seas Act, 46 U.S.C. §§ 761, 762, *National Airline, Inc. v. Stiles*, 268 F. 2d 400 (5 Cir. 1959), cert. den. 361 U. S. 885. Courts have consistently construed these federal statutes to exclude an award for the loss of decedent's society and companionship. *Igneri v. Cie. de Transports Oceaniques*, 323 F. 2d 257 (2 Cir. 1963), cert. den. 376 U. S. 949. In our view, the remedy recently provided by the Supreme Court in *Moragne* for death caused by the unseaworthiness of a vessel under the general maritime law does not adopt, or require the adoption of, any different or greater measure of damages. *U. S. Steel Corp. v. Lamp*, ___ F. 2d ___ (6 Cir. 1970), Nos. 19835-39, Slip Opinion dated December 23, 1970. First, in this regard Congress has furnished the guide by enacting the foregoing statutes which are of parallel import. Secondly, the uniformity and supremacy of the maritime law dictate the need and desirability of a national rule for computing damages, especially in death cases, and thereby avoiding the diverse and often conflicting

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provisions of wrongful death statutes of the several states and the interpretations placed thereon by the courts. The instant case presents a classic example of confusion which would arise from any effort to supplement the general maritime law by borrowing from state law in computing damages. The first question would be which state's laws to apply, that of Illinois or Missouri, depending on where the maritime tort occurred, or that of Arkansas, where the decedent resided, or that of Louisiana, where the petitioner is incorporated, or that of Mississippi, which is the forum state. Each of these jurisdictions has a wrongful death statute which provides varying elements of recovery for different classes of beneficiaries, and at least one, Missouri, has a fixed statutory ceiling. Speiser, *Recovery for Wrongful Death* (1969 Supp. p. 139). See *Glick v. Ballentine Produce Co.*, 343 F. 2d 839 (8 Cir. 1965), for a discussion of the differences between the Missouri and Arkansas wrongful death statutes. We do not interpret the Fifth Circuit decisions of *Grigsby v. Coastal Marine Service*, 412 F. 2d 1011 (5 Cir. 1969), or *Hornsby v. Fish Meal Co.*, 431 F. 2d 865 (5 Cir. 1970), upon which the Administratrix relies, as requiring us to depart from the federally-established rule of damages only for pecuniary loss because of unseaworthiness of the vessel.

13. In awarding damages, the court should reasonably compensate the widow, the minor son until he becomes 21, *Stark v. Chicago, North Shore & Milwaukee Ry. Co.*, 203 F. 2d 786 (1953), and the partially dependent adult daughter, *First National Bank in Greenwich v. National Airlines*, 288 F. 2d 621 (2 Cir.

1961); *Gulf C. & S. F. R. Co. v. McGinnis*, 228 U.S. 173, 57 L. Ed. 785 (1913), for the loss of contributions that they would have received for support out of the accrued and future gross earnings of the decedent had he lived. These losses, as heretofore found, equal 75% of Griffith's gross income for the balance of his work-life expectancy. In determining the extent of loss from future earnings, which is the principal element of the claim, the court should consider the decedent's actual earnings at the time of death, his work habits, and his prospects for advancement, *Petition of Risdal and Anderson, Inc.*, 291 F. Supp. 353 (D.C. Mass. 1968), and make no deduction for state and federal income taxes where the yearly estimated earnings, as here, are not clearly above the reach of the middle income scale. *Cox v. Northwest Airlines, Inc.*, 379 F. 2d 893 (7 Cir. 1967), cert. den. 389 U.S. 1044. Post-award losses, however, are to be discounted for present value and segregated from pre-award losses for that purpose; and under present economic conditions a discount rate of 4% is proper. Also, privation of parental nurture and guidance to a minor child is an element of pecuniary loss long recognized by the federal decisions. *Michigan Central R. Co. v. Vreeland*, supra; *Petition of Risdale*, supra. The value of parental nurture, as heretofore found, varies directly with its quality and quantity. *Moore-McCormick Lines, Inc. v. Richardson*, 295 F. 2d 583 (2 Cir. 1961).

14. There being no evidence that the deceased pilot was aware of the set or cross-current at flood stage or in high water just above Veterans Bridge, based on his prior experience or knowledge, Griffith may not be presumed to have been personally negligent. Thus, he

cannot be held contributorily negligent for the improper navigation and no diminution of damages on account of comparative negligence may be made in the death award.

15. Canal contends that the Eads Bridge was constructed in a manner that violated the Acts of Congress authorizing its erection, and because of such violation, the owners of Eads Bridge were negligent by maintaining an unreasonable obstruction to navigation which proximately contributed to the collision so that collision damages sustained by the owner and operator of Eads Bridge should be reduced one-half under the rule of *The Pennsylvania*, 19 Wall. 125, 86 U.S. 25 (1873), and applied by the Fifth Circuit in *Green v. Crow*, 243 F. 2d 401 (5 Cir. 1957). In rejecting this contention, we consider briefly the two enabling statutes, 14 Stat. 246, adopted July 25, 1866, and its amendatory Act, 15 Stat. 123, adopted July 20, 1968. By the original statute the bridge was to be built in accordance with the following conditions:

> "First, that the lowest part of the bridge or bottom chord shall not be less than *fifty feet above the city directrix at its greatest span*. Second, that it shall have at least one span five hundred feet in the clear, or two spans of three hundred and fifty feet in the clear of abutments. If the two latter spans be used, the one over the main steamboat channel, shall be fifty feet above the city directrix, *measured to the lowest part of the bridge at the centre of the span*. Third, no span over the water at low-water mark shall be less than two hundred feet in the clear of abutments." (Emphasis added)

The 1868 amendatory Act provided, in pertinent part, as follows:

> "in conformity to the act of which this act is amendatory . . . and not inconsistent with the provisions of the act to which this act is amendatory: And provided further, That in constructing said bridge *there shall be one span of at least five hundred feet clear between piers.*" (Emphasis added)

As constructed, the middle span of the Eads Bridge has 520 feet clearance between piers and may be regarded as "its greatest span" since the east and west spans have no more than 502 feet clearance between piers. At its center, the bottom chord of the middle span (as is also true with the east and west spans) is more than 50 feet above the city directrix, but this amount of clearance does not extend, as petitioner claims it should, for the entire horizontal length of the span, or from pier to pier. Petitioner's contention conflicts with familiar rules of statutory construction. The phrase in the original Act reading ". . . bottom chord shall not be less than fifty feet above the city directrix at its greatest span" is ambiguous and does not clearly require 50-foot height along the entire horizontal length of the 500-foot span, although the phrase might suggest such an inference. The later sentence, however, which specifically states that a 50-foot clearance is required only at the center of each 350-foot span, clarifies the ambiguity and shows that no such stringent height requirement should be read into the earlier sentence. First of all, the separate sections or clauses of a single statute should be read by courts to harmonize with each other whenever possible.

Secondly, later specific clauses should be read to qualify prior general clauses which are ambiguous. Thirdly, it would be illogical and inconsistent for Congress to require more vertical clearance under a 500-foot span than under a 350-foot span, and a court may not impute to Congress such an illogical purpose in drafting legislation if it may be avoided, as it may here. As for the amendatory Act, it adopts all requirements of the prior Act, and merely specifies that at least one span of the bridge be at least 500 feet wide, which has no effect on the ambiguity of the prior Act previously discussed. Wholly apart from construing the enabling Acts, the record shows that neither the Chief of Engineers, U.S. Army, nor any other governmental authority has ever reported or declared the Eads Bridge to be an unreasonable obstruction to navigation. 33 U.S.C. § 512 et seq. No doubt, the venerable Eads, now in its 97th year, may present a hazard to navigation, as do all bridges, but it is not an unreasonable obstruction to navigation and remains a lawful structure, and its owner and operator are entitled to rely upon boats passing through it carefully and avoiding contact with and damage to the structure. *Seaboard Airline R. Co. v. Pan American Petroleum & Transport*, supra; *Texas & P. Ry. Co. v. Angola Transfer Co.*, 18 F. 2d 18 (5 Cir. 1927).

16. The Bridge Company and Terminal are entitled to recover the full cost of the repairs to the Eads Bridge without reduction for depreciation since the repairs have not resulted in any enhancement of the value of the structure nor extended its useful life. *Browning Steamship Co., Inc., v. Peavey & Co.*, 235 F. 2d 5 (8 Cir. 1956); *Shepard S.S. Co. v. U.S.*, 111 F. 2d 110 (2 Cir. 1940); *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S.

146, 69 L. Ed. 890 (1925). Terminal is also entitled to recoup its established losses in revenues and increased expenses sustained during the time that the Eads Bridge was under repair. *City of Miami v. Western Shipping & Trading Co.*, 232 F. 2d 847, (5 Cir. 1956); *The Conqueror*, 166 U.S. 110, 41 L. Ed. 937 (1897). The loss of such profits and increases in expenses may be proved circumstantially, and the court may consider as a relevant, corroborating circumstance earnings for comparable periods before the damage was sustained. *Bonheuar v. San Francisco & P.S.S. Co.*, 287 F. 679 (9 Cir. 1923); *South Carolina State Highway Dept. v. U.S.*, 78 F. Supp. 598 (E.D. S.C. 1948); *Oil Screw Noah's Ark v. Bentley & Felton Corp.*, 322 F. 2d 3 (5 Cir. 1963). Terminal may also recover necessary and reasonable expenses for providing substitute passage and transfer of its customer trains. *State Road Dept. v. U.S.*, 78 F. Supp. 278 (N.D. Fla. 1948); *City and County of San Francisco v. U.S.*, 82 F. Supp. 313 (N.D. Cal. 1948). Terminal discharged its legal duty to mitigate losses as much as was practicably possible under the circumstances.

17. The general rule in admiralty is that those injured by tortious collision are entitled to interest as part of just compensation for wrong done, and discretion to deny interest is based upon existence of peculiar circumstances. *Sinclair Refining Co. v. S. S. Green Island*, 426 F. 2d 260 (1970). Accordingly, the court, in the exercise of its discretion, allows interest from June 15, 1970, upon the claim of the Bridge Company and Terminal, and from November , 1969, upon the minor property damage claims.

Let Judgment be entered accordingly.

This, 26th day of February, 1971.

/s/ WILLIAM C. KEADY
Chief Judge
United States District Court

APPENDIX A
MADISON
U. S.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2226

IN THE MATTER OF THE PETITION OF CANAL BARGE COMPANY, INC., AS OWNER AND OPERATOR OF THE M/V ELAINE JONES, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

CANAL BARGE COMPANY, INC.,
Petitioner-Appellant-
Cross Appellee,

versus

MARY KATHRYN GRIFFITH, Individually and as Administratrix of the Estate of George L. Griffith, deceased,
Respondent-Appellee-
Cross Appellant,

TERMINAL RAILROAD ASSOC. OF ST. LOUIS, ET AL,
Respondents-Appellees.

Appeals from the United States District Court for the Northern District of Mississippi

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(March 30, 1973

Before GODBOLD and RONEY, Circuit Judges and BOYLE, District Judge.

GODBOLD, Circuit Judge: This case arises from a collision on October 14, 1969 between the M/V *Elaine Jones*, a towboat owned and operated by Canal Barge Company, Inc. (Canal), and the Eads Bridge, a fixed structure that spans the Mississippi River at St. Louis, Missouri. The impact caused extensive damage to the bridge and resulted in the death of the towboat pilot, George L. Griffith. Eads Bridge is owned by St. Louis Bridge Company and operated by Terminal Railroad Association of St. Louis.

Canal filed a petition seeking exoneration or limitation of liability. In response, Mary Kathryn Griffith, as personal representative of the decedent,[1] claimed money damages for the death of her husband; Terminal sought recovery for damages to the bridge and loss of revenue; and two other corporate claimants made demand for minor property damage. Canal counterclaimed for indemnity from the Griffith estate claiming that negligence of Griffith was the proximate cause of the mishap.

The District Court found that Canal was negligent through its employees, that the *Elaine Jones* was unseaworthy, that Canal's negligence proximately caused the collision and the unseaworthiness proximately contributed thereto, and that Griffith was not negli-

1 The District Court concluded that, as administratrix of George L. Griffith's estate, Mary Kathryn Griffith had standing to sue under both the Jones Act and the general maritime law. See 45 U.S.C. §§ 51, 59; 46 U.S.C. § 688; Lindgren v. U.S., 281 U.S. 38, 74 L.Ed. 686 (1930); Moragne v. States Marine Lines, 398 U.S. 375, 26 L.Ed. 2d 339 (1970).

gent. Accordingly, the court held Canal liable for damages to all claimants. Canal appeals, claiming error with respect to liability and damages, both as to Terminal and to Mrs. Griffith. Mrs. Griffith cross appeals with regard to the amount of damages awarded and elements of damage allegedly omitted. We affirm with respect to Canal's liability to Terminal and to Mrs. Griffith, and with respect to the damages due Terminal. We reverse with respect to damages due Mrs. Griffith and with respect to her husband's contributory negligence.

We focus on four areas of inquiry: (I) liability as between Canal and Terminal; (II) liability as between Canal and Mrs. Griffith; (III) damages due Terminal; (IV) damages due Mrs. Griffith on behalf of George Griffith's beneficiaries designated by pertinent statutory and general maritime law.

We set out the facts needed to understand our disposition.[2]

The *Elaine Jones*, a 5300 horsepower diesel towboat, was manned by Captain Stroschein, pilot Griffith, and eight support personnel. Stroschein boarded the *Elaine Jones* as pilot on Sept. 29, 1969. His previous experience included piloting similar towboats of 4300 horsepower, but his regular employment was as master of an 1800 horsepower vessel. When Griffith came aboard on Oct. 7, Stroschein became master and Griffith pilot. The two had never served together before. Griffith regularly piloted a sister vessel of the *Elaine*

2 Exhaustive findings of fact detailing with precision every aspect of the collision and damages appear in the District Court's opinion reported at 323 F.Supp. 805.

Jones, identical in dimension but having 1000 less horsepower.

The *Elaine Jones* passed northbound through St. Louis Harbor on Oct. 9 when the Mississippi River gauge was 4.7 feet, well below flood stage of 30 feet. It operated north of St. Louis for several days, then proceeded back downriver with seven empty barges. At Wood River, Illinois, just north of St. Louis, while Captain Stroschein was on watch, one empty and two loaded barges were added to the tow and the entire ten-barge tow rearranged. With Captain Stroschein still at the controls, the *Elaine Jones* departed Wood River heading south pushing the tow. Shortly before noon when Griffith was due to relieve Stroschein at the wheel, the *Elaine Jones* arrived at Lock 27, located at Mile 185, five miles north of Eads Bridge. Griffith took over from Stroschein at 11:45 a.m. and left Lock 27 five minutes later.

In the interval between the *Elaine Jones*' upriver passage through St. Louis Harbor on Oct. 9 and its departure from Lock 27 on Oct. 14, and as a result of heavy rainfall, the river at the harbor had risen precipitously to 30.3 feet, just above flood stage of 30 feet, a fact known to both pilot and master.

The physical facts concerning St. Louis Harbor, and the effects of high water are well described by the District Court.

> 3. St. Louis Harbor, the site of this accident, because of the presence of six river bridges, their close proximity and construction,

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coupled with the meander of the river and its currents, enjoys a reputation among river people of being a difficult area or passage to safely navigate, particularly in high water. A vessel southbound, as was the ELAINE JONES, after departing Lock 27, is first confronted with the Merchants Bridge (Mile 183), and then the McKinley Bridge (Mile 182.5), which present limited horizontal clearance. Immediately after passing the McKinley Bridge, the vessel must line up for safe passage of the Veterans Bridge (Mile 180.2) and then the Eads Bridge (Mile 180). Just downriver from the Eads Bridge are the Poplar Street Bridge (Mile 179.3) and the MacArthur Bridge, also known as the "City" bridge (Mile 179). For southbound traffic, a gradual bend in the river from left to right occurs above the Veterans Bridge and extends to below the MacArthur Bridge. Contributing to the navigation problem is the presence of Eads Bridge which, due to its arched construction, affords a limited amount of clearance in high water through which vessels can safely pass. Also, during high water, i.e., 20 feet or more on the St. Louis gauge, the current immediately above Veterans Bridge runs from the right descending bank to the left descending bank, from the Missouri shore toward the Illinois shore. This high water current condition, called a left-hand "set" or "draft", has a pronounced effect of moving a southbound boat and tow toward the Illinois bank rather than straight ahead. These navigation con-

ditions exist whenever the river is at 20 feet or more on the St. Louis gauge and are facts known to experienced mariners navigating towboats through that section of the Mississippi River.

* * * *

5. * * * As the river stage exceeds 20 feet, the force of the aforementioned set to the left above Veterans Bridge likewise increases; and also as the rate of rise in the river accelerates, the force of the set becomes more violent. Although a sudden rise of the river increases the severity of the set, this is an operating factor known to persons experienced in navigating St. Louis Harbor during high water. Moreover, the experienced navigator of a downbound vessel can reasonably predict the severity of current in St. Louis Harbor by observing upriver conditions at Wood River, Illinois, and water levels at Lock 27.

6. The above left set or cross-current is not encountered by downbound vessels except in high water. At all other times the current in the immediate area runs straight down the river. When navigating the harbor downbound in low water (10 feet or less), it is an acceptable practice for a vessel to approach the Veterans and Eads Bridges in line with their green lights and pass under both along the mid-channel sailing line, as depicted on the U.S. Engineers' official chart (Ex. 13). See

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> App. A. This sailing line is the normal low water configuration for passage of a descending vessel. When navigating the harbor downbound in high water, it is the commonly accepted practice, in order to compensate for the left hand set encountered just above Veterans Bridge, to approach Veterans Bridge well to the right of the mid-channel sailing line, or favoring the Missouri shore. By this means, the vessel and tow are not forced by the cross-current to the left of the mid-channel sailing line, as it runs immediately beneath both the Veterans and Eads Bridges. Thus, a downbound vessel and tow that in high water approach the Veterans and Eads Bridges within one-quarter of a mile north of Veterans Bridge on the mid-channel sailing line are too wide or "out of shape" to safely navigate the passage beneath the two bridges.

323 F.Supp. at 808-09.

Before the towboat's departure from Lock 27, Stroschein spoke briefly to Griffith without issuing any instructions for navigating St. Louis Harbor, and then left the wheelhouse for the galley. Stroschein returned at 12:10 p.m., at which time the head of the tow was more than a mile above Veterans Bridge, or approximately half way between McKinley Bridge, mile 182.5, and Veterans Bridge, mile 180.2. Stroschein noted without comment that Griffith had set the *Elaine Jones* on the mid-channel sailing line, the course to be followed under normal river conditions. At that time the vessel had not yet reached the fail-safe point; that is, the point in the river beyond which correcting the

course to a heading proper under the extraordinary conditions would be too late to avoid almost certain mishap. Still the captain said nothing about the river conditions or the course to be followed nor did he assume command. Pilot Griffith continued on the mid-channel sailing line past the fail-safe point and until the head of the tow reached about one-quarter mile north of Veterans Bridge. At this juncture the left hand set in the river was encountered, pushing the vessel and tow violently to the left and toward the left descending channel and the left pier of Veterans Bridge. The pilot took measures to attain a proper heading, but his efforts were to no avail. It was only when the towboat was about 100 feet above Veterans Bridge (at which time most of the tow would have passed under that bridge) that Captain Stroschein first became alarmed.

The *Elaine Jones* bumped the river pier of Veterans Bridge, causing some of the tow wires to part and the tow to jack-knife. Stroschein abandoned the wheelhouse when he realized a collision with Eads Bridge was unavoidable, but Griffith remained to maneuver the vessel off the Eads Bridge pier toward which it was headed. The towboat missed the pier, but seconds later the wheelhouse struck the bottom portion of Eads Bridge. Griffith left the controls immediately prior to impact but was crushed by falling metal and killed instantly. Everyone else escaped.

I. Liability as between Canal and Terminal.

The District Court correctly held that, in the absence of sufficient proof in rebuttal, presumption of fault at-

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taches to a moving vessel which collides with a fixed object and makes a prima facie case of fault against the vessel. *The Oregon*, 158 U.S. 186, 39 L.Ed. 943 (1895); *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir. 1967).

Canal attempted to meet its burden in part by showing that Eads Bridge was constructed in such manner as to violate the Act of Congress authorizing its erection,[3] and it therefore constituted an obstruction to navigation, the maintenance of which was negligent and a proximate cause of the collision. This argument, the District Court found, rested on an erroneous construction of the statute.[4] We perceive no error in that court's construction and cannot add profitably to its discussion.

The District Court correctly held the defense of inevitable accident to be inapplicable.[5] "Inevitable accident" is not as much a true defense as it is a convenient label expressing the idea that once a presumption of negligence arises the burden shifts to the presumptively negligent party to come forward with proof that the accident in no way resulted from its own lack of due care. *Atkins v. Lorentzen*, 328 F.2d 66, 69 (5th Cir. 1964); Gilmore & Black, The Law of Admiralty § 7-2, at 397 (1957). As will be seen from part II, below, Canal failed to carry its burden of showing that none of its personnel — captain, pilot, or shore captain in radio contact — was remiss in doing "everything which an experienced mariner could do, adopting ordinary cau-

3 14 Stat. 246 (1866), *as amended*, 15 Stat. 123 (1868).

4 323 F. Supp. at 822-23.

5 323 F. Supp. at 819.

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tion." *The Union S.S. Co. v. The New York & Virginia S.S. Co.*, 65 U.S. 307, 313, 16 L.Ed. 699, 701 (1861).

II. Liability as between Canal and Mrs. Griffith.

Canal was found liable to Mrs. Griffith as personal representative on the basis of the Jones Act, 46 U.S.C. § 688, and the general maritime law, *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed.2d 339 (1970).

The findings of negligence on the part of Canal may be quickly dealt with. We review them under the "clearly erroneous" rule, *McAllister v. U.S.*, 348 U.S. 19, 99 L.Ed. 20 (1954), which requires they be affirmed.

Stroschein, the towboat captain, was found wanting in due care in the following particulars: (a) tendering to his pilot a tow without affording him an opportunity to get the feel of the tow before encountering unusual river conditions which the master knew were hazardous to navigate; (b) failing to inform his pilot of a hazard to navigation of which he had knowledge; (c) failing to instruct his pilot as to the proper method of navigating St. Louis Harbor under known hazardous conditions; (d) failing to take charge when the pilot plainly misgoverned the vessel; (e) abandoning the wheelhouse in the face of danger.

Finding (b) is so obviously correct as to require no comment.

As to (a), on the basis of clear and competent expert testimony, the District Judge found that it takes "some minutes" after the vessel reaches full speed for an ex-

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perienced pilot to get the feel of a particular tow arrangement. The arrangement had been made up while Captain Stroschein was on watch, and Griffith, handling the tow for the first time, had been piloting for only a few minutes when he came into the difficult passage of St. Louis Harbor. These findings dispose of the contention of Canal that the pilot had the feel of his tow from his prior experience.

Regarding (c), the court found that Stroschein was aware of the hazardous conditions in the harbor, having himself previously piloted vessels safely through the area at high water. Also the court heard testimony that every pilot was familiar with the dangerous condition caused by high water.

There can be no real dispute over conclusion (d), and Canal has not contended otherwise, that the captain was negligent in failing to take charge when the pilot plainly misgoverned the vessel.

Canal questions conclusion (e), Stroschein's negligence in abandoning the wheelhouse, by the unpersuasive argument that since Griffith was not negligent in fleeing seconds after Stroschein, the captain's earlier departure could not have been an act lacking the requisite care. In the interval between the captain's and the pilot's departures, Griffith, by remaining, managed to maneuver the vessel sufficiently to avoid a potentially more serious collision with the pier of the bridge. The court was justified in inferring that the captain's presence might have aided in minimizing the disaster.

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The trial court also found Canal negligent because its port captain failed to warn the master and pilot of the navigational hazards of St. Louis Harbor although he had "privity or knowledge" of such hazards. The port captain is located at Canal's shore facility at Natchez, Mississippi, which had twice daily radio contact with the *Elaine Jones* and Canal's other vessels. During October 10-14, when the *Elaine Jones* was operating just above St. Louis Harbor, other Canal vessels were in the vicinity and in daily radio communication with Natchez, which was aware of the unusual rise in the river in the St. Louis area, and the flood conditions existing. The conclusions of the District Court are not clearly erroneous.[6]

The *Elaine Jones* was found to be unseaworthy in these respects: "(a) Her master *and pilot* were unfit to meet the perils reasonably to be anticipated in her voyage through St. Louis Harbor. . . . (b) Her master *and pilot* were unequal in disposition and seamanship to the ordinary man in the calling under like circumstances. . . ." which unseaworthy condition proximately contributed to the accident. 323 F.Supp. at 820 (citations omitted) (emphasis added). Under the plainly erroneous rule this is to be affirmed.

The findings concerning unseaworthiness, insofar as they relate to Griffith, lead us into discussion of the

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6 United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958, 26 L.Ed. 2d 542 (1970), and United Geophysical Co. v. Vela, 231 F.2d 816, 819 (5th Cir. 1956), are not to the contrary. In those cases the concern was with whether persons far from the scene should have issued orders in conflict with or countermanding orders of the master on the scene and in an emergency. Here the issue is whether instructions should have been given before an emergency arose.

point most strenuously urged by Canal, which is that Griffith negligently chose his course through St. Louis Harbor, which negligence caused or contributed to the accident, and that findings to that effect are required by the finding that unseaworthiness was predicated in part on Griffith's insufficiency as a pilot. It is perhaps an overstatement that a finding of unseaworthiness requires in all cases a finding of contributory negligence.[7] We do, however, conclude that application of the correct legal standards to the facts found by the District Court requires in this case a conclusion that Griffith was guilty of some negligence and that his negligence was a proximate cause of the collision. We leave to the District Court on remand the determination of the extent of Griffith's negligence and its comparative contribution to his death.

This necessary conclusion of negligence on Griffith's part is significant in at least two respects. Canal claims that negligence by Griffith is a basis for recovery over by it, in whole or in part, against Griffith for damages due Terminal from Canal. Additionally, while not a complete defense to the Griffith

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7 In Waldron v. Moore-McCormack Lines, 386 U.S. 724, 18 L.Ed. 2d 482 (1967), at trial the petitioner's sole contention had been "that the mate's assignment of two men to do the work of three or four constituted negligence and made the vessel unseaworthy." Id. at 725, 18 L.Ed.2d at 484. The jury found no negligence, and the court directed a verdict for respondent on the unseaworthiness issue. On appeal the Supreme Court remanded to provide petitioner an opportunity to present his theory of unseaworthiness to the jury. Unless we were to assume that the Court's remand served only to engage the jury in pointless exercise, by allowing it to give only a negative answer to the inquiry whether the vessel was rendered unseaworthy by the mate's nonnegligent act, the Court's disposition indicates that findings that one person's acts are both nonnegligent and the cause of unseaworthiness are not legally irreconcilable.

claim insofar as it is based on unseaworthiness, the finding of contributory negligence is a proper factor to be considered in fixing the amount of recovery. *Pope & Talbot v. Hawn*, 346 U.S. 406, 98 L.Ed. 143 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 n.11; 90 L.Ed. 1099, 1105-06 n.11 (1946); *Manning v. M/V Sea Road*, 358 F.2d 615 (5th Cir. 1965); *Cox v. Esso Shipping Co.*, 247 F.2d 629 (5th Cir. 1957). The same is true under the Jones Act.

Under the authorities which we discuss below, Griffith was negligent in pursuing an unreasonably dangerous course if he possessed either actual knowledge of hidden dangers or constructive knowledge chargeable to him as matter of law. It is clear that Griffith knew of the high water level, and the court found that he did and also found that he knew that Eads Bridge had only limited clearance, making it necessary to pass beneath the center of its channel span. But the court concluded that Griffith did not know of the hazard to navigation caused by high water and consisting of the left hand set to the current directly above Veterans' Bridge. Canal correctly points out that Griffith piloted a similar towboat southbound through St. Louis Harbor on previous occasions. But the court found that the evidence did not reveal that on any of those occasions high water conditions existed.[8] On adequate evidence the court also concluded that neither Captain Stroschein nor Canal's other supervisory personnel informed Griffith of the leftward current at high water. The finding of lack of actual

8 There was evidence that on four of those passages high water conditions did not prevail and on the fifth, when they did, it was not clear that the passage took place during Griffith's watch. Indeed, the most reasonable inference is to the contrary.

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knowledge of the particular hazard is, therefore, not plainly erroneous.

We turn then to consideration of whether as a matter of law Griffith was chargeable with knowledge, that is, whether he is required to suffer the legal consequences of knowledge although he did not actually possess it. These facts found by the court bear on that determination: "experienced mariners navigating towboats through that section of the Mississippi River" knew that the set occurred when the river gauge was above 20 feet, but Griffith did not know of the set; Griffith had seven years experience in piloting vessels of other towing companies on various rivers, including the Mississippi; Griffith had piloted through St. Louis Harbor southbound at least four times; Griffith had never piloted a vessel through this area at high water, but Stroschein had; a sudden rise in the water increases the severity of the set, a fact known "to persons experienced in navigating St. Louis Harbor during high water." The court entered this conclusion of law:

> There being no evidence that the deceased pilot was aware of the set or cross-current at flood stage or in high water just above Veterans Bridge, based on his prior experience or knowledge, Griffith *may not be presumed to have been personally negligent.* Thus, he cannot be held contributorily negligent for the improper navigation and no diminution of damages on account of comparative negligence may be made in the death award.

323 F.Supp. at 822 (emphasis added).

"[T]hose who undertake any work calling for special skill . . . are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability." Prosser, Law of Torts § 32, at 164. In *Atlee v. The Nw. Union Packet Co.*, 88 U.S. (21 Wall.) 389, 22 L.Ed. 619 (1875), a barge collided with a stone pier built into a river, and suit was brought in admiralty by the barge owner for recovery. The District Court found mutual fault on the part of the pier owner and the barge's pilot, but the Court of Appeals reversed in part, finding no fault on the part of the pilot. The Supreme Court reversed and held that the pilot was at fault. It observed: "[T]he pilot of a river steamer . . . is selected for his personal knowledge of the topography through which he steers his vessel. . . . He must know where the navigable channel is . . . . He must also be familiar with all dangers that are permanently located in the course of the river. . . . To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs or snags, or other objects newly presented against which his vessel might be injured." *Id.* at 396, 22 L.Ed. at 621. The Court acknowledged that it was exacting a very high order of ability. The pilot had been absent for a year and thus did not know what "[a]ny pilot who, during the navigable season of the year 1870, was engaged in conveying vessels up and down the Mississippi River past Fort Madison, would have known . . . ." *Id.* at 397, 22 L.Ed. at 622. The Court noted that after so long an absence the pilot should make a few trips with other pilots more familiar with the river. It concluded that "there was such want of

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knowledge and skill in the pilot, and such want of care in his management of his vessel at that point" as to lead to the conclusion that the pilot was at fault. *Id.* at 398, 22 L.Ed. at 622. In summary, a pilot was held to have a duty to perform his functions with the skill and knowledge of an ordinary Mississippi River pilot recently familiar with the area. In failing to inform himself of the changes an ordinary pilot would expect, and in acting without such knowledge, the pilot did not fulfill his duty.

Davidson S.S. Co. v. U.S., 205 U.S. 187, 51 L.Ed. 764 (1907), was a collision case tried to a jury. The defendant steamship company was found liable for damages to a recently extended government pier in Lake Superior, caused when its ship collided with the pier. The Court viewed the question before it as "whether there was testimony from which the jury might rightfully find the defendant guilty of negligence." *Id.* at 193, 51 L.Ed. at 767. The pilot had been on the lake for many years, but he had not been in the particular harbor for over a year. He knew that harbor improvements were being made on the lake and that information circulars were available. The Court said: "[T]here is an obligation on all persons to take the care which, under ordinary circumstances of the case, a reasonable and prudent man would take, and the omission of that care constitutes negligence." *Id.* Following this statement of obligation was the passage from *Atlee* describing the degree of knowledge required of a river pilot. The Court concluded: "His very want of knowledge, when he had the means of ascertaining the facts, could properly be regarded as negligence. Clearly, it could not be held as matter of law not to be so." *Id.*

at 194, 51 L.Ed. at 767. Negligence thus consisted of the pilot's failure to inform himself when information was available about conditions regarding which an experienced pilot would have reason to desire information.

In *The Severance*, 152 F.2d 916, (4th Cir. 1945), *cert. denied*, 328 U.S. 853, 90 L.Ed. 1626 (1946), the factual cause of the collision was a freshet in the river, which made the ship take a sudden sheer. The lower court found no neglect by the pilot. The Fourth Circuit reversed, holding:

> We must presume here that Captain Dosher either knew, or by the exercise of reasonable care should have known, of the prevailing conditions on the Cape Fear River. By undertaking to act as pilot of the "Severance," he promised the skill of his art.

Id. at 920.

Utility Service Corp. v. Hillman Trans. Co., 244 F.2d 121 (3d Cir. 1957), is factually very similar to the instant case. As a towboat in the Ohio River passed through one of two channels created by the presence of an island in midstream it collided with a stationary barge as a result of a crosscurrent for which the pilot had not compensated. There was evidence from which it could have been found that the opening of a dam upriver increased the current and that this effect was readily noticeable to experienced mariners. Under normal conditions the current deflected slightly at the island, causing crosscurrents that become noticeable

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as the river's rate of flow increased. The pilot knew of such crosscurrents when the main current increased, but he did not know of the particular crosscurrent that caused the collision "because I had no previous experience of going that close to the island, in current." *Id.* at 123 (emphasis deleted). The court affirmed the conclusion that the pilot was negligent in risking passage between the island and the equipment, a course he had never before taken in swift water, considering that there was an alternative manner of passage. It said:

> Appellant's pilot should have been aware of the crosscurrent, for the law imposes a duty upon him to be "constantly informed of changes in the current of the river" and the "changes made by the hand of man or the action of the elements in the path of his vessel." Davidson Steamship Co. v. United States, 1907, 205 U.S. 187, 194, 27 S.Ct. 480, 483, 51 L.Ed. 764. Rivers are not immutable. Rains swell their volume; the opening of dams increase their current; deposits of silt may change their depths; wrecks may obstruct them. Where the river pilot has the means of obtaining information concerning these changes, he is deemed in law to know them. If he tests the danger of increased current at a place where his common sense and nature's physical laws would tell him that a crosscurrent would embarrass his progress, he does so at his own risk.

Id. at 124.

The foregoing authorities, applied to the findings of fact made in the present case, require the conclusion that the pilot was guilty of contributory negligence as a matter of law. He knew of the high water level. The court found that the particular current conditions existing at St. Louis Harbor under circumstances of high water were known to experienced pilots and that Griffith was an experienced pilot. As such, he was required to inform himself of special current conditions arising from circumstances known to him. *Atlee v. The Nw. Union Packet Co., supra*. Thus, while specifically charging the master with knowledge of all navigational conditions reasonably ascertainable by mariners experienced in navigating St. Louis Harbor at flood stage, the court absolved Griffith of negligence because it considered him not chargeable with the same body of knowledge because he was not experienced in navigating the harbor at flood stage. The foregoing authorities make clear that this was an incorrect conclusion.

Appellee Griffith characterizes the statement of a pilot's duty as a presumption (supported in this to some degree by the District Court's Conclusion of Law, *supra*) which can be relied upon only where the employer's liability to a third party is in issue, and not between employer and employee. But the facts in *Hillman* make clear that knowledge is not merely a fact presumed and rebuttable by evidence that the fact was not known. Secondly, it seems to us to make no difference that the failure of duty is asserted by employer against employee. Where the seaman fails to perform his own legal obligation concurrently with other failures of the employer, and as a consequence of

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the concurrent failures an accident occurs causing injury or death to the seaman, the seaman's failure can be reflected as an offset to his recovery. This is plain vanilla comparative negligence, a result not proscribed by the special status of seamen as wards of admiralty. The particular respect in which the pilot is negligent has no bearing on the determination of who should bear the loss as between negligent pilot and employer. The crucial factor is not that the pilot failed to discover a fact he should have known, as opposed, for example, to his having known all he should but oversteering; it is that the pilot in some manner did not meet his legal duty. Cf. *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464, 470 (5th Cir. 1966), *cert. denied*, 387 U.S. 908, 18 L.Ed.2d 625 (1967).

An additional factor present in this case and not in those discussed above is that the pilot whose knowledge was insufficient was acting under the command of another whose knowledge was commensurate to that of the ordinary pilot and who did not tell the pilot what he should do. Appellee maintains this prevents Griffith's being contributorily negligent. We do not reach in this case the question of whether if Griffith had asked if there was anything of special nature he should know or do in light of high water conditions, and had been given an answer on which he relied, he would have fulfilled his duty. In the absence of inquiry by Griffith, Stroschein's failure to discharge his duty to inform the pilot bears on whether Stroschein was negligent, but it does not insulate Griffith from the consequences of his own breach of duty. Griffith's duty to possess himself of essential knowledge existed independently of whether there was present

another employee who by reason of his superior rank had a duty to inform Griffith. Stroschein had a duty to tell without being asked. Griffith had a duty to ask (of Stroschein or from other sources). The duty of each did not negative the duty of the other, or excuse failure of the other to carry out his duty.

Canal Barge claims that if Griffith was negligent it is entitled to at least some degree of indemnification from Griffith for damages due to Terminal. Canal appears to be proceeding on a tort indemnity theory rather than an actual or implied contract. Griffith contends as a general proposition that in a collision case in admiralty the employer-shipowner cannot seek indemnity from its employee-pilot for damages caused to a third party and resulting from the pilot's negligence. No admiralty cases are cited to us in which indemnity was either permitted or forbidden in such circumstances. But see *Tri-State Oil Tool Indus. Co. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969), a suit in admiralty; Restatement of Restitution § 96 (1937); Restatement of Agency (Second) § 401 (1958), particularly comment *d*. *See also Rodriquez v. U.S. Lines Co.*, 181 F.Supp. 95 (S.D.N.Y. 1960) and *The Providence*, 293 F. 595 (D.R.I. 1923), in which the substance of the indemnity question was not reached but the court permitted the ship or shipowner to implead its pilot or other employee-crew member whose negligence was claimed to be the sole basis for liability of ship or owner. We reach no conclusion and intimate no views on the indemnity question which must be first considered by the trial court.

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III. Damages due to Terminal.

Canal has mounted a broad assault on the damages awarded to Terminal. The damages fall into these categories: (1) loss of toll revenue attributable to automobile traffic across Eads Bridge; (2) loss of revenue from passenger train traffic; (3) additional costs incurred in routing and manning over the city's toll bridge trains normally carried by Eads; (4) Eads repair costs. With respect to the first three categories Canal's objections narrow down with few exceptions to the single assertion that the lower court's findings are clearly erroneous.

(1) *Auto tolls.* Terminal set out to prove loss of auto tolls by introduction of business records indicating vehicle revenues earned by Eads during comparable periods before and after the accident. See *South Carolina State Highway Dept. v. U.S.*, 78 F.Supp. 598 (E.D.S.C.), *aff'd*, 171 F.2d 893 (4th Cir. 1948). Of course, no two time periods are free of differences that may significantly affect bridge usage. In this case during the entire repair period vehicular traffic over Eads was restricted to two lanes of the four ordinarily available. Also, before Eads resumed full operation, new egresses into downtown St. Louis were opened from a nearby free interstate highway, tending to divert traffic from the bridge. Appellant has referred us to other factors as well that may have caused the estimate of loss attributable to Canal to fall short of perfection. However, this circuit has indicated that to allow a tortfeasor to avoid paying damages because such damages were to some necessary extent imperfectly established would be unjust and unbearable.

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ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 374 F.2d 455 (5th Cir. 1967). There we relied upon *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L.Ed.2d 652, 660 (1946), in which the Supreme Court noted that in those cases where exact loss is unascertainable, a just and reasonable estimate of the damage based on relevant data may be made and the verdict rendered accordingly. See, *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962). *Daniels Towing Serv., Inc. v. Nat Harrison Assoc., Inc.*, 432 F.2d 103, 105-06 (5th Cir. 1970). See also *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 392 (6th Cir. 1962), *cert. denied*, 372 U.S. 907, 9 L.Ed.2d 717 (1963); *North Texas Producers Assoc. v. Young*, 308 F.2d 235, 244-245 (5th Cir. 1962), *cert. denied*, 372 U.S. 929, 9 L.Ed.2d 733 (1963); *Hughes v. Great American Indemnity Co.*, 236 F.2d 71, 75 (5th Cir. 1956), *cert. denied*, 352 U.S. 989, 1 L.Ed.2d 368 (1957). Neither the evidence nor the method of ascertaining damages arising from loss of vehicle tolls was unsuited for the purpose, and the trial court gave due weight to the variables appellant has noted. We find no error.

(2) *Passenger train revenue.* While Eads underwent repairs, passenger trains that normally used it to cross the Mississippi into St. Louis Union Station were shuttled by Terminal over the city's Municipal Bridge. The toll there incurred by Terminal was nearly twice the rate Terminal charged passenger lines for use of its own bridge. Terminal was entitled to the Eads tolls it lost. Canal, however, contends that Terminal was not the real party in interest to press such a claim because it had passed on to the passenger lines

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the full city tolls. See Fed. R. Civ. P. 17(a). In connection with this real party in interest objection, Canal maintains that the District Court violated the parol evidence rule.

Evidence heard over Canal's objection revealed that unless the railroads themselves made Terminal's usage of Municipal Bridge necessary, Terminal billed, and the railroads expected to pay, the lower Eads toll whether a train crossed Eads or Municipal Bridge. This billing practice was said to be based on a course of dealing between Terminal and the railroads. The practice notwithstanding, Terminal passed on the full Municipal toll to its customers, because it was short of cash while Eads was out of service. The railroads paid under protest and with the expectation that they would be reimbursed the difference between the Eads toll ordinarily paid and the Municipal toll required of them. The evidence of course of dealing did not violate the parol evidence rule. Professor Corbin has stated the substance of the rule, which is one of substantive law and not at all of evidence, as follows:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 Corbin, *Contracts* § 573, at 357 (1960). This definition suggests two inquiries, the answers to which lead us

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to our conclusion that no infringement of the rule occurred: Did the parties assent to a writing as the complete and accurate integration of a contract between them? Regardless of the answer to the first question, is the evidence offered of antecedent understandings or is it of subsequent agreements? For, as Corbin epigrammatically states, "Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today." *Id.* § 574, at 372. In order for a subsequent agreement to modify or discharge a contract made by the parties, it must itself comply with the requirements of a valid contract. *Id.* § 574, at 371 n.12. However, when additional terms or provisions of an agreement can be proved by parol evidence, thereby showing that the written document in court is not a complete integration, "[i]t is not necessary that an additional promise shall have its own separate consideration, or that the additional terms shall be sufficient, quite apart from the document, to constitute a valid contract." *Id.* § 583, at 467-68. Decisions abound holding that such terms or provisions can be proved by parol evidence, "even though it is clear that the additional terms form a part of one contractual transaction along with the writing." *Id.* § 583, at 466-67. For a collection of some of these cases, see *id.* §583, at 465 n.88 (1960, Supp. 1971).

Canal asserts that the court erred by permitting Terminal's witnesses to testify about a subsequent course of dealing in an attempt to alter, vary and change the unambiguous terms of the basic operating agreement between Terminal and its customer railroads entered into in writing on October 1, 1889. "Extrinsic evidence may be . . . helpful in deciding whether there has been

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an integration, and no rule bars 'parol evidence' or any other relevant evidence for the purpose of determining whether the parties have agreed upon the writing as a complete and accurate statement of what is agreed upon between them. Farmer v. Arabian American Oil Co., 277 F.2d 46 (2d Cir.), cert. denied, 364 U.S. 824, 81 S.Ct. 60, 5 L.Ed.2d 53 (1960); 3 Corbin §§ 573 & 582; Restatement of Contracts §228 (1932)." *Carolina Metal Products Corp. v. Larson*, 389 F.2d 490, 493 (5th Cir. 1968). By concluding that Terminal was obligated to reimburse the railroads for the increased cost of Municipal Bridge that Terminal had passed on to the railroads, the District Court impliedly found as a fact, and we think correctly, that the 1889 agreement was not a complete and accurate integration. We have not discovered any portion of the 1889 agreement that, even by means of contractual interpretation, arguably speaks to the allocation of toll costs between Terminal and the railroads, such allocation being the subject of the testimony to which Canal objected. Whether the course of dealing subsequent to 1889 sufficed to establish a new contract supplanting the 1889 agreement or merely supplemented the existing written understanding by supplying a vital but missing term, evidence of it was properly heard and credited in the absence of contradiction. See, e.g., *Franklin Research & Development Corp. v. Swift Electrical Supply Co.*, 340 F.2d 439, 443 n.3 (2d Cir. 1964); *Edward E. Morgan Co. v. U.S.*, 230 F.2d 896 (5th Cir. 1953); Corbin, *supra*, § 556, cf. Uniform Commercial Code §§ 1-205, 2-202 (applicable to sale of goods).

Due consideration for the evidence of course of dealing compels our conclusion that Terminal was the real party in interest with respect to claims for passenger

train tolls. Rule 17(a)'s requirement that "[e]very action . . . be prosecuted in the name of the real party in interest" directs attention to whether the plaintiff has a significant interest in the particular action he has instituted. See 6 Wright & Miller, Federal Practice & Procedure: Civil § 1542, at 639 (1971). Its effect "is that the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right." *Id.* § 1543, at 643; see *Gagliano ex rel. Gagliano v. Bernsen*, 243 F.2d 880 (5th Cir. 1957); *Young v. Powell*, 179 F.2d 147, 150 n.10 (5th Cir.), *cert. denied*, 339 U.S. 948, 94 L.Ed. 1362 (1950). As stated by the Advisory Committee in its Note to the 1966 Amendment to Rule 17(a).

> [T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata.

In the testimony concerning prior course of dealing and the explanation of the deviation therefrom, no suggestion emerged that there had been any change in relationship between Terminal and the railroads that would relieve Terminal of ultimate responsibility for the difference between its own and Municipal tolls. On the contrary, Terminal's comptroller testified, in line with the evidence of the past course of dealing, that his company had received protests and demands for repayment from several of the railroads. The evidence indicates a continuing legal obligation of Terminal to reimburse the railroads the difference between the

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tolls. Thus, Terminal was the party entitled to enforce the right to recovery.

(3) *Rerouting expense.* Since 1968 Terminal has maintained daily records of its usage of Eads Bridge and Merchants Bridge, both of which it owned, and Municipal Bridge, owned by the city of St. Louis and to which Terminal paid tolls. During the eight months that Eads was out of service, Terminal continued to maintain these records, indicating with an "Eads" notation each freight train which crossed the Mississippi via Municipal but which would have moved via Eads had that facility been available. Summaries of the records for this eight month period and for two comparable pre-accident periods were put in evidence to prove the increased usage of Municipal due to the unavailability of Eads. The District Court awarded losses attributable to freight operations on the record of the post-accident period, the period which produced the smallest award. Finding no fault with the method utilized to compute damages, Canal submits that the records underlying the summaries were inaccurate and thus the award was based on speculation. Bearing in mind what we have stated above regarding the degree of certainty required to prove damages, Canal's objection is not well taken.[9]

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9 Canal has noted in addition that no witness who testified about the three-bridge summaries had actual knowledge of train movements which the records purported to show and that the person who made the analysis and prepared the records was not presented for cross-examination. We do not concern ourselves with these objections which relate primarily to the admissibility of the evidence, for Canal never objected to admissibility. In fact, Canal admitted in response to Terminal's Request for Admission of Fact that the records were prepared in the ordinary course of business, were maintained in the ordinary course of business, and were regular business records of Terminal, and it denied only the accuracy of the records.

Canal attempted to discredit the accuracy of the records by demonstrating that trains in fact moving across Municipal but designated "Eads" on the post-accident records could not have utilized Eads in any event because the locomotives powering them were too large for that bridge. Terminal employees explained to the apparent satisfaction of the trial judge that trains were classified in the freight yards according to the bridge to be used, prior to assignment of a locomotive. Since Eads was shut down, it was unnecessary to assign engines small enough to move via Eads; thus, the fact that a train crossed Municipal under power of a locomotive too large for Eads did not necessarily establish that it was not an "Eads"-designated train.

Canal elicited testimony that even while Eads was open, Terminal's general manager had complained that the company was routing too much traffic over Municipal and had directed that every effort be made to reduce Terminal's usage of that bridge. The general manager explained, however, that the increased use of Municipal did not draw traffic away from Eads but from Merchants, Terminal's other bridge. Terminal's witness admitted that at one point the bridge record showing an "Eads" movement over Municipal was wrong, but he added that "it's a normal business record and nobody operates a business that doesn't have some errors made, . . . this is as good as any railroad record that you will find, and it's the sort of record upon which we pay our bills and on which we bill people on." There are other and similar examples of impeachment and rehabilitation. When all is said and done the choice of what evidence to credit belongs to

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the trier of fact. His findings of damages do not leave us "with the definite and firm conviction that a mistake has been committed." *U.S. v. Oregon Medical Society*, 343 U.S. 326, 339, 96 L.Ed. 978, 988 (1952).

(4) *Repair costs.* The award of damages included the cost of repairs to Eads Bridge, without any reduction for depreciation. Findings were made that at the time of the collision the bridge was in sound condition, that it had a remaining useful life of an indefinite number of years, and that it had been fully depreciated in accordance with governing rates. Canal urges that the law requires a reduction of damages to account for depreciation and that the court erred in not trimming recoverable costs accordingly. See, e.g., *Patterson Terminals, Inc. v. S/S Johannes Frans*, 209 F.Supp. 705 (E.D. Pa. 1962). While we do not differ with Canal's statement of a general principle of damages, the application of that generality to the specific facts of this case requires no reduction for depreciation.

A party suffering injury to his property is entitled to no more than restoration to its condition prior to the wrong. See, e.g., *The Baltimore*, 75 U.S. (8 Wall.) 377, 19 L.Ed. 463 (1869); *Tug June S v. Bordagain Shipping Co.*, 418 F.2d 306 (5th Cir. 1969); *T. H. Browning Steamship Co. v. F. H. Peavey & Co.*, 235 F.2d 518, 988 (8th Cir. 1956). As a practical matter, repair may leave property in a better condition. Depreciation, which in terms of a declining dollar figure reflects the annual depletion of an item's continuing usefulness for a given purpose, then becomes a handy tool to reduce the recovery for repair costs to the level necessary to return the injured party to the economic position in

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which he was found. Since the repairs neither enhanced the value nor extended the life of Eads, reduction of recoverable repair costs by depreciation previously taken would leave Terminal in a significantly worse economic position than before the accident. The case is similar to *U.S. v. Pinckney*, 150 F.Supp. 790 (S.D. Ga. 1957), where depreciation was applied to reduce recoverable replacement costs of only those components of a demolished marker beacon having an ascertainable life. With respect to the component that the parties agreed had not and would not depreciate, the court made no reduction in recovery. As in *Pinckney*, no recovery less than the full repair costs will replace in the Eads Bridge value commensurate to its pre-accident worth.

In support of its position Canal has cited to us *Brooklyn Waterfront Terminal Corp. v. International Terminal Operating Co.*, 211 F.Supp. 702 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 221 (2d Cir. 1962), *Patterson Terminals, Inc. v. S.S. Johannes Frans, supra*, and *Jemison v. The Duplex*, 163 F.Supp. 947 (S.D. Ala. 1958). In each of these cases the court found that the damaged or destroyed property had a definite life span which had partially elapsed at the time of the accident, or that repairs enhanced the structure's value beyond its prior worth, and reduced recovery accordingly. See also *Rauls Bros. Contractors, Inc. v. U.S.*, 251 F.Supp. 47 (M.D. Fla. 1966); *General American Transp. Co. v. The Patricia Chotin*, 120 F.Supp. 246 (E.D. La. 1954). The specific holdings of none of these cases purport to apply where repairs add no new value to the structure.

IV. Recovery due Mrs. Griffith.

Canal contends that the District Court erred by including in the computation of loss of future earnings at 2% per year cost of living increase, by failing to discount future earnings by taxes to be paid, and by setting the discount rate at 4% instead of a higher figure.[10]

In *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970), a suit under the Jones Act and the general maritime law, we held that the court did not err in charging the jury that decreased purchasing power of the dollar is a proper element for consideration in determining the amount of tort award.[11] See also *Grigsby v. Coastal Marine Serv.*, 412 F.2d 1011, 1042 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033, 24 L.Ed.2d 531 (1970). We see no reason for a different rule when damages are determined by the court rather than by a jury. Therefore, the District Judge did not err in adjusting his computations by a 2% anticipated an-

10 The record refutes Canal's contention that the decedent's adult married daughter who was gainfully employed and receiving an allotment from her estranged husband was not entitled to any damages for her father's wrongful death. The evidence showed that she was dependent on her father for food and lodging.

11 Our independent examination of the briefs in *Cunningham* reveals that plaintiff produced an actuary who testified that the dollar could be expected to decline in value at an average annual rate of 2% over plaintiff's remaining anticipated worklife. In light of this testimony, *Cunningham* must be read as rejecting any logical or practical distinction between an instruction as to the dollar's present deflated value, which had been previously approved in New Amsterdam Co. v. Soileau, 167 F.2d 767 (5th Cir.), *cert. denied*, 335 U.S. 822, 93 L.Ed. 376 (1948), and an instruction as to future inflationary trends.

nual increase in the cost of living.[11 B]

No deduction for income taxes should be made where annual estimated earnings are not clearly above the reach of the middle income scale. *Blue v. Western Ry.*, 469 F.2d 487, 492-96 (5th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3393 (Jan. 10, 1973) (No. 72-972); *In re Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005, 17 L.Ed.2d 544 (1967); *McWeeny v. New York, N. H. & H. R. R.*, 282 F.2d 34 (2d Cir.) (en banc), *cert. denied*, 364 U.S. 870, 5 L.Ed.2d 93 (1960).[11 C] The decedent's earnings of $11,321 during his last year of life do not exceed the range in which added exemptions or deductions would drastically affect tax liability. Thus any present attempt to adjust for future tax liability is too speculative to undertake. Compare *Blue v. Western*

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11 B In Johnson v. Penrod Drilling Co., 469 F. 2d 897 (1972), a panel of this court reversed on procedural grounds the lower court's disposition of suits for personal injuries sustained on navigable waters, and remanded the causes for new trial. In its supervisory capacity, the court stated that on remand "the triers of the facts should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings." 469 F. 2d at 906. On petitions for rehearing and for rehearing en banc, the portions of the *Penrod* opinion concerning that subject matter have been withdrawn.

Prior to revision of *Johnson v. Penrod Drilling Co.* on petition for rehearing, this court in Crador v. Boh Bros., Inc., ___ F. 2d ___ (5th Cir. Feb. 12, 1973), remanded a maritime action for personal injuries for redetermination of damages in light of *Penrod* and *Blue v. Western Ry.* The briefs in *Crador* show that none of the points of error raised on appeal concerned the adjustment of damages to reflect inflationary or deflationary trends. Consequently *Crador* does not conflict with the law of this circuit established in *Cunningham v. Bay Drilling Co.*

11 C This circuit also holds that a trial judge commits no error in refusing to instruct the jury that lump sum awards in personal injury actions are not subject to income taxation. See Greco v. Seaboard Coast Line R. R., 464 F.2d 496 (5th Cir. 1972); Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997 (5th Cir. 1964).

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Ry., *supra* (anticipated annual earnings of $11,433, no deduction); *In re Marina Mercante Nicaraguense, S.A.*, *supra* (anticipated annual earnings of $9,300 to $11,500, no deduction) with *Hartz v. U.S.*, 415 F.2d 259 (5th Cir. 1959) (anticipated annual earnings of approximately $65,000 deduction permissible in FTCA action); *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044, 19 L.Ed.2d 836 (1968) (anticipated annual earnings of $15,000 to $20,000, deduction permissible); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir.), *cert. denied*, 382 U.S. 878, 15 L.Ed.2d 119 (1965) (anticipated annual earnings of $16,000 and $25,000, deduction permissible).

As for the application of a 4% discount rate on future earnings, there was evidence that it would be possible to invest at a higher rate. But also there was evidence that Mrs. Griffith was not a sophisticated investor, and that given the size of the fund and the need to invade principal periodically, fixed payment annuities (offered by established companies at maximum effective rates of interest of 4 1/2% would be her best investment. Under *Blue v. Western Ry.*, *supra*, the applicable discount factor is a reasonable interest rate "over the period of the remaining anticipated worklife of the plaintiff," 469 F.2d at 497 (emphasis deleted), not the current yield on blue-chip corporate securities. The court did not err in choosing the 4% figure.

We reject the claim of Mrs. Griffith as cross appellant that the District Court should have decreased the lost earnings awarded as damages by a factor of 15% instead of 25% because the lesser figure more

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closely represented the deceased's personal consumption of his earnings. We have reviewed Mrs. Griffith's testimony that her husband's personal upkeep accounted for approximately $150 per month, or approximately 15% of his earnings, against her other testimony detailing the family's expenses by categories. The District Court's finding that his needs accounted for $250 per month, or 25%, is not clearly erroneous.

We turn to the second and far more substantial contention raised on cross appeal. The action maintained for the decedent's survivors derives partially from *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed.2d 339 (1970), which overruled *The Harrisburg*, 119 U.S. 199, 30 L.Ed. 358 (1886), and held "that an action does lie under general maritime law for death caused by violation of maritime duties." 398 U.S. at 409, 26 L.Ed.2d at 361. Mrs. Griffith contends that damages under the new maritime action for death caused by unseaworthiness include compensation for lost love and affection, which we have called "survivor's grief." *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 141 (5th Cir. 1972).[12] Relying by analogy on the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act, 46 U.S.C. §§ 761-68, and rejecting as discordant with admiralty's quest for uniformity the suggestion that state law be borrowed, the District Court concluded that damages for survivor's grief could not be recovered in a general maritime action for

12 This circuit recognizes a distinction between damages for loss of such measurable services as transportation and home repairs, and damages for survivor's grief. See Dennis v. Central Gulf S.S. Corp., 323 F.Supp. 943 (E.D. La. 1971), *aff'd*, 453 F.2d 137 (5th Cir. 1972).

death caused by unseaworthiness. For use in the event we disagreed, the District Judge found that the decedent's family would be entitled to $60,000 for lost love and affection, divided $20,000 to the widow and $10,000 to each of the children. Mrs. Griffith contends that the court erred in refusing to award these additional damages. We agree that survivor's grief damages are not recoverable in a general maritime action, although for somewhat different reasons than those given by the court below.

Moragne fashioned only the skeletal outline of a federal cause of action for death in state territorial waters caused by breach of general maritime duties. Resolution of ancillary questions, such as the applicable statute of limitations, the beneficiary scheme, and the measure of damages, was left to "await further sifting through the lower courts in future litigation." 398 U.S. at 408, 26 L.Ed.2d at 361. Today we articulate in part the elements of this still infant maritime death action. While indeed "[t]he channel here is as hard to find as the course of the Mississippi River," *In re Sincere Navigation Corp.*, 329 F.Supp. 652, 654 (E.D. La. 1971), we are not entirely without markers. As the *Moragne* Court counselled, its overruling of *The Harrisburg* "does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law" and thus "[i]n most respects the law applied in personal-injury cases will answer all questions that arise in death cases." 398 U.S. at 405-06, 26 L.Ed.2d at 360. In discussing questions regarding time limitations on suit and schedules of beneficiaries, the Court noted the possibility of clues

in DOHSA, the Jones Act, and the Longshoremen's and Harbor Workers' Compensation Act. See *id.* at 406-07, 26 L.Ed.2d at 360-61. For persuasive analogies in resolving "still other subsidiary issues . . . such as particular questions of the measure of damages," the opinion points to DOHSA and "the numerous state-wrongful death acts that have been implemented with success for decades." *Id.* at 408, 26 L.Ed.2d at 361.

Moragne, then, makes clear that both state and federal law are appropriate guides for those lower courts who must fill in the interstices of the general maritime death remedy. In post-*Moragne* cases this circuit has carefully followed the approach suggested by *Moragne*. For example, in *Gaudet v. Sea-Land Servs., Inc.*, 463 F.2d 1331 (5th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3417 (Jan. 22, 1973) (No. 72-1019). we described our function in shaping the *Moragne* action in the following terms:

> [W]e have neither the intention nor the need to weave out of whole cloth a new suit in which to clothe this previously unrecognized cause of action; we have but to piece together the materials that are already available, *e.g.*, the general maritime law, personal-injury cases, state wrongful death statutes, and the Death on the High Seas Act, by a pattern that complements the purposes designed by the Supreme Court in *Moragne*.

Id. at 1332. *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3229, is another example of the approach to be employed.

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Citing analogies from state and federal law, the court allowed recovery for pain and suffering in a general maritime death action even though these damages are not recoverable under the Death on the High Seas Act.[13] Outside DOHSA, however, pain and suffering damages had been widely recognized as an appropriate element of recovery. For example, they had long been recoverable in personal injury actions under general maritime law, and they were generally recoverable in actions under state survival statutes brought by beneficiaries of mariners killed in state territorial waters. As the opinion further points out, they had even been awarded in DOHSA actions through the expedient of borrowing a state survival statute countenancing pain and suffering damages to supplement recovery under DOHSA. See *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971); *Canillas v. Joseph H. Carter, Inc.*, 280 F.Supp. 48 (S.D.N.Y. 1968).[14]

The methodology for the "further sifting" contemplated by *Moragne* has thus been firmly established in this circuit. In shaping the new remedy we look first to existing maritime law, to which *Moragne* has allowed access in a death action. We next examine the remedial policies indicated by Congress in the federal maritime statutes. Heed to these statutes will

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13 Dennis also upheld recovery of funeral expenses, which also are not recoverable under DOHSA. See 453 F.2d at 141.

14 An additional clue not mentioned in *Dennis* is that pain and suffering damages are recoverable in actions under the Jones Act, 46 U.S.C. § 688. See In re U.S. Steel Corp., 436 F.2d 1256 (6th Cir. 1970), *cert. denied sub nom.* Lamp v. U.S. Steel Corp., 402 U.S. 987, 29 L.Ed.2d 153 (1971).

assist in ensuring that "uniform vindication of federal policies" mandated by the *Moragne* Court. See 398 U.S. at 401, 26 L.Ed.2d at 357. Finally we look for "persuasive analogies" in the state wrongful death acts. The importance of the role of these state acts is accented by their long and successful contribution to the growth of federal maritime law, and in their assistance in influencing the direction of admiralty law toward solution of contemporary maritime problems. See generally Gilmore & Black, Law of Admiralty § 1-16 (1957). To the extent that policies developed under state death remedies are applicable in a maritime context, then, those policies should influence the content of the new maritime death remedy.[15]

The policies manifested in those federal laws mentioned by *Moragne* point toward nonrecoverability of survivor's grief damages. First, under general maritime law, our primary referent, grief damages are not recoverable. *Igneri v. Cie. de Transports Oceani-*

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15 In discussing the importance of state death acts, *Dennis* states:

> "As *Moragne* teaches, it would be anomalous for us to take away a pre-*Moragne* remedy which was almost universally available by the application of state survival statutes when there is no federal maritime policy against such recovery."

453 F.2d at 140. As this statement suggests, elements of recovery borrowed from state death acts must be consonant with federal maritime policies. *Moragne* itself alludes to the importance of using the state experience in only a selective manner:

> "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."

398 U.S. at 401, 26 L.Ed. 2d at 357.

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ques, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949, 11 L.Ed.2d 969 (1964), established that in actions under general maritime law to recover for personal injuries caused by both negligence and unseaworthiness, the spouse may not recover for loss of consortium, which was defined as "the mutual right of the marriage partners to each other's society, companionship, and affection, including sexual intercourse." *Id.* at 260 n. 2. Accord, *Simpson v. Knutsen, O.A.S.*, 444 F.2d 523, 525 (9th Cir. 1971); *In re U.S. Steel Corp.*, 436 F.2d 1256, 1278 (6th Cir. 1970), *cert. denied sub nom. Lamp v. U.S. Steel Corp.*, 436 U.S. 987, 29 L.Ed.2d 153 (1971); *Curry v. U.S.*, 338 F.Supp. 1219, 1223 (N.D. Cal. 1971); *Smith v. Olsen & Ugelstad*, 324 F.Supp. 578, 582 (E.D. Mich. 1971); *Valitutto v. D/S I/D Garonne*, 295 F.Supp. 764 (S.D.N.Y. 1969); *Sanseverino v. Alcoa S.S. Co.*, 276 F.Supp. 894 (D. Md. 1967). Second, suitors under DOHSA may recover only for pecuniary losses, which do not include survivor's grief. *Igneri v. Cie. de Transports Oceaniques, supra* at 266 n.21; *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 330 (2d Cir.), *cert. denied*, 293 U.S. 577, 79 L.Ed. 674 (1934); *Peterson v. United N.Y. Sandy Hook Pilots Ass'n*, 17 F.Supp. 676, 678 (E.D.N.Y. 1936). Finally, suitors under the Jones Act cannot recover damages for survivor's grief. *Igneri v. Cie. de Transports Oceaniques, supra* at 266; *Savard v. Marine Contracting, Inc.*, 296 F.Supp. 1171, 1176 (D. Conn. 1969); *Tate v. C.G. Willis*, 154 F.Supp. 402, 403 (E.D. Va. 1957); *Gerardo v. U.S.*, 101 F.Supp. 383, 385 (N.D. Cal. 1951). The Jones Act, incorporating the Federal Employers' Liability Act, permits recovery only for pecuniary loss, which "does not include damages by way of recompense for grief or wounded feelings" or "losses which result from the

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deprivation of the society and companionship." *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 70-71, 57 L.Ed. 417, 422 (1913).

The state guideposts to which *Moragne* refers are not so easily categorized. In *In re Sincere Navigation Corp.*, 329 F.Supp. 652 (E.D. La. 1971) (appeal pending, No. 72-2254), the court perceived a trend toward allowing recovery for survivor's grief under state death statutes and concluded that the maritime action for death should also permit such recovery. We are unable to agree that the trend in state law is sufficiently strong to override the policies against recovery manifested in federal law.[16]

The most persuasive state analogies should logically come from those pre-*Morange* cases in which state death acts were borrowed to provide a maritime remedy for death caused by unseaworthiness.[17] For

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16 We are indebted to Judge Rubin for the thorough research in *Sincere Navigation*, which has served as a key to our inquiry into the nature of recovery under the various state death acts.

17 Recovery for death caused by unseaworthiness is allowed under the statutes of the following states: California, Curry v. Fred Olsen Line, 367 F.2d 921 (9th Cir. 1966), *cert. denied*, 386 U.S. 971, 18 L.Ed. 2d 131 (1967); Louisiana, Grigsby v. Coastal Marine Serv., 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033, 24 L.Ed.2d 531 (1970); Maryland, Maryland v. Nabella, 176 F. Supp. 668 (D. Md. 1959); Michigan, Hunter v. Dampsk. A/S Flint, 279 F.Supp. 701 (E.D. Mich. 1967); New Jersey, Skovgaard v. The M/V Tungus, 252 F.2d 14 (3d Cir. 1957), *aff'd*, 358 U.S. 588, 3 L.Ed. 2d 524 (1959); New York, Cunningham v. Rederiet Vindeggan A/S, 333 F.2d 308 (2d Cir. 1964); Oregon, Tallman v. Toko Kaium K.K. Kobe, 278 F.Supp. 452 (D. Ore. 1967); Puerto Rico (commonwealth), Compania Transatlantica Espanola, S.A. v. Torres, 358 F.2d 209 (1st Cir. 1966); South Carolina, Anthony v. International Paper Co., 289 F.2d 574 (4th Cir. 1961); Virginia, Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960); West Virginia, Union Carbide Corp. v. Goett, 278 F.2d 319 (4th Cir.), *cert. denied*, 364 U.S. 826, 5 L.Ed.2d 55 (1960).

example, under the South Carolina, Virginia, and West Virginia statutes, mental anguish is an appropriate element of damages, and all three statutes have been construed to allow recovery for unseaworthiness.[18] The Maryland and Michigan statutes, which also have been construed to permit recovery for unseaworthiness, have recently been amended to provide damages for nonpecuniary loss.[19] Yet research indicates that under none of these statutes have mental grief damages been awarded for maritime deaths, and construction of their liberal damage provisions in a maritime context remains undisclosed.[20] On the other hand, mental grief damages

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18 See 1962 S.C. Laws Ann. § 10-1954 [recovery for mental anguish allowed since Brickman v. Southern Ry., 54 S.E. 553 (S.C. 1906), maritime law incorporated into statute with Anthony v. International Paper Co., 289 F.2d 574 (4th Cir. 1961)]; 1950 Va. Code Ann. § 8-636 [recovery for mental anguish allowed since Virginia Iron Coal & Coke Co. v. Odle's Adm'r, 105 S.E. 107 (Va. 1920), maritime law incorporated into statute with Halley v. The Manfred Stansfield, 186 F.Supp. 212 (E.D. Va. 1960)]; W. Va. Code Ann. § 55-7-6 [recovery for mental anguish allowed since Kelley v. Ohio R. Co., 52 S.E. 520 (W. Va. 1905), maritime law incorporated into statute with Union Carbide Corp. v. Goett, 278 F.2d 319 (4th Cir.), *cert. denied*, 364 U.S. 826, 5 L.Ed.2d 55 (1960)].

19 See Md. Code Ann. art 67, § 4 [maritime law incorporated into statute with Maryland v. Nabella, 176 F. Supp. 668 (D. Md. 1959), statute modified in 1969 (Md. Acts of 1969, ck. 352, § 1) to include damages for sentimental loss in the event of death of spouse or minor child]; Mich. Compiled Laws Ann. § 600.2922 [maritime law incorporated into statute with Hunter v. Dampsk A/S Flint, 279 F. Supp. 701 (E.D. Mich 1967), statute modified in 1971 (Mich. Laws. Ann. § 600.2922 (Supp. 1972)), to provide for damages for loss of society and companionship].

20 Searching for analogies in post-*Moragne* cases that apply state statutes in a maritime action may be unproductive. At least three cases hold that the *Moragne* remedy entirely supplants recovery under state law. See Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970); Dennis v. Central Gulf S.S. Corp., 323 F.Supp. 943 (E.D. La. 1971), *aff'd*, 453 F.2d 137 (5th Cir. 1972); In re U.S. Steel Corp., 436 F.2d 1256 (6th Cir. 1970), *cert. denied sub nom.* Lamp v. U.S. Steel Corp., 402 U.S. 987, 29 L.Ed.2d 153 (1971).

have often been awarded under state death acts for land-based torts,[21] but the differing rationales and factual circumstances underlying allowance of such recovery make difficult the extraction policies applicable in a maritime context. For example, some courts have apparently upheld survivor's grief damages on the theory that punitive damages are recoverable under the state's wrongful death statute. See, e.g., *Sloss-Sheffield Steel & Iron Co. v. Drane*, 160 F. 780 (5th Cir. 1908); *Leahy v. Morgan*, 275 F.Supp. 424 (N.D. Iowa 1967). California recognizes psychic injury as an element of damages, but restricts recovery to parents who actually witness the negligently inflicted death of their minor child. See *Dillon v. Legg*, 441 P.2d

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The current area of state law providing the most persuasive clues for effectuation of the maritime duty of unseaworthiness may be the law of strict products liability. Both strict products liability and liability for unseaworthiness are a species of liability without fault. Indeed, at least one commentator has suggested that Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099 (1946), which extended the shipowner's duty to stevedores, represents acceptance by maritime law of the doctrine of MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), the forerunner of modern products liability law. See Stevens, Erie R. R. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246, 260 n.77 (1951). The nature of recovery under state statutes for deaths caused by defective products is, however, as yet ill defined. A majority of states do not permit any recovery in death actions based on a theory of strict products liability. See Prosser, The Law of Torts § 95, at 652 n.95 (3d ed. 1964). States that have permitted recovery for wrongful death caused by defective products have not yet defined the relationship between strict liability and recovery for mental anguish. See, e.g., Greco v. S.S. Kresge Co., 12 N.E. 2d 557 (N.Y. 1938); Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965). See generally Comment, The Application of Breach of Warranty to Wrongful Death Statutes: Conflict Between Archaic Legal Concepts and a Sense of Justice, 22 Baylor L. Rev. 384 (1970). See also Annot., Allowance of Punitive Damages in Products Liability Cases, 29 A.L.R. 3d 1021 (1970).

21 *Sincere Navigation* cites 24 states as allowing recovery for psychic injury to beneficiaries in a death action. 329 F. Supp. at 652.

912 (Cal. 1968), *overruling Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963). Occasionally liberal recovery under state wrongful death acts has been permitted without distinguishing between tangible loss of services and intangible grief. See, *e.g.*, *Louisville & N.R. Co. v. Whisenant*, 58 So.2d 908 (Miss. 1952)[22] Several state wrongful death statutes allowing recovery for survivor's grief limit the amount recoverable, *e.g.*, W. Va. Code Ann. § 55-7-6, and at least one limits grief recovery to spouses and parents, Md. Code Ann. art. 67, § 4 (Supp. 1972). And one court has upheld survivor's grief damages while denying damages for pecuniary loss. See *Gregg v. Coleman*, 235 F.Supp. 237 (E.D.S.C. 1964).[23]

We conclude that the current rationales underlying recoverability for survivor's grief damages in state death actions are too divergent and ill defined to override the policies against recoverability manifested in general maritime law and in the federal statutes. This conclusion is not based on a mandate that the *Moragne* recovery be identical in all respects to general maritime law and to federal maritime statutes. Absolute uniformity is neither required nor desirable. Necessarily variations in proof, procedure, beneficiaries, and damages will affect the nature of recovery under various remedies and will cause the mariner to join alternative claims whenever

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22 See note 12 *supra*.

23 The Restatement would allow recovery for unintentionally inflicted psychic injury arising upon harm to a third person only when the tortfeasor has placed the one suffering psychic injury in fear of bodily harm. Restatement (Second) § 313 (1965) See also *Id.* § 46.

possible.[24] Our conclusion results rather from measuring the federal policies manifested in the federal statutes and general maritime law against those policies expressed in the state experience and relevant to maritime problems. This is the methodology we perceive to be compelled by *Moragne* and followed by this court in at least four post-*Moragne* cases. See *Futch v. Midland Enterprises, Inc.*, ___ F.2d ___ (5th Cir. Jan. 8, 1973) (No. 72-2900); *Gaudet v. Sea-Land Servs., Inc.*, 463 F.2d 1331 (5th Cir. 1972); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3229; *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970).

While not crucial to our decision, we note that other circuits that have considered the issue have uniformly denied grief damages in a general maritime action. See *Greene v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972); *Simpson v. Knutsen, O.A.S.*, 444 F.2d 523 (9th Cir. 1971); *In re U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied sub nom. Lamp v. U.S. Steel Corp.*, 402 U.S. 987, 29 L.Ed.2d 153 (1971). District courts have divided on the issue. Compare *In re Farrel Lines, Inc.*, 339 F.Supp. 91 (E.D. La. 1971); *In re Sincere Navigation Corp.*, *supra*, with *Mungin v. Calmar S.S. Corp.*, 342 F.Supp. 479 (D. Md. 1972); *Curry v. U.S.*, 338 F.Supp. 1219 (N.D. Cal. 1971); *Green v. Ross*, 338 F.Supp. 365 (S.D. Fla. 1972).

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24 For example, under McAllister v. Magnolia Pet. Co., 357 U.S. 221, 2 L.Ed. 2d 1272 (1958), an injured seaman has alternative actions under the Jones Act for negligence and the general maritime law for unseaworthiness. The *Moragne* Court indicated that the beneficiaries of a seaman killed in territorial waters could pursue recovery under either the Jones Act or the new maritime action for death. See 398 U.S. at 396 n.12, 26 L.Ed. 2d at 354 n.12.

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V. Conclusion.

AFFIRMED in part; REVERSED in part; REMANDED for proceedings not inconsistent with this opinion.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

Before GODBOLD and RONEY, Circuit Judges and BOYLE, District Judge.

PER CURIAM:

The Petition for Rehearing filed on behalf of Mary K. Griffith, etc. is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is Denied.

The petition for rehearing filed on behalf of Canal Barge Company is Denied in all respects except with regard to the issue of whether the District Court erred by including in the computation of loss of future earnings a 2% per year cost of living increase. Action on that issue is withheld pending consideration by the court en banc of Johnson v. Penrod Drilling Company, 478 F.2d 1208 and Starnes v. Penrod Drilling Company, 478 F.2d 1208. The mandate in this case shall be stayed pending the further orders of the court.

The motion of Canal Barge Company to supplement the record in this case by addition of testimony given subsequently and in an unrelated case is Denied.

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Petition of Canal Barge Company, Inc., as owner and operator of the M/V ELAINE JONES, praying for exoneration from or limitation of liability.

CANAL BARGE COMPANY, INC., Petitioner-Appellant Cross Appellee,

versus

Mary Kathryn GRIFFITH, Individually, and as Administratrix of the Estate of George L. Griffith, Deceased, Respondent-Appellee Cross Appellant,

Terminal Railroad Assoc. of St. Louis, et al., Respondent-Appellees.

No. 71-2226.

United States Court of Appeals,
Fifth Circuit.

May 16, 1975

Appeal from the United States District Court for the Northern District of Mississippi.

(ON PETITION FOR REHEARING)

(Opinion March 30, 1973, 5 Cir. 1973, 480 F.2d 11.)

Before GODBOLD and RONEY, Circuit Judges and BOYLE, District Judge.

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BY THE COURT:

The petition for rehearing of Canal Barge Company, Inc., with respect to the issue of whether the District Court erred by including in the computation of loss of future earnings a 2% per year cost of living increase is granted. In Johnson v. Penrod Drilling Company, 510 F.2d 234 (CA5, 1975), this Court, sitting *en banc*, held that the influence of possible inflation or deflation on future damages is too speculative a matter for judicial determination and, therefore, that the trier of fact should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings. Accordingly, we conclude, on rehearing, that the District Court erred by including a 2% per year cost of living increase in the computation of loss of future earnings.

The order of the Court denying the petition for rehearing of Mary K. Griffith, etc., 480 F.2d 11 at 34, is vacated insofar as it concerned those damages, other than pecuniary, which plaintiff is entitled to recover in a general maritime action for the wrongful death of George L. Griffith. In the case at bar, the District Court found that Griffith's dependents had sustained general damages for loss of love, affection, companionship and society. The District Court, however, declined to award such damages, holding that the applicable law did not authorize an award of general damages. Petition of Canal Barge Company, 323 F.Supp. 805, 814 (N.D. Miss. 1971). On appeal, this Court affirmed the denial of general damages to Griffith's dependents under a general maritime action for wrongful death. 480 F.2d at 29-30.

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Subsequent to our decision on appeal, the Supreme Court, in Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 584, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), concluded that, under the maritime wrongful death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses. In McDonald v. Federal Barge Lines, Inc., 496 F.2d 1376 (5th Cir. 1974), this Court held that *Gaudet* damages were proper where, as here, there was liability for the death of a seaman under both the Jones Act and the general maritime law. *Accord* Landry v. Two R. Drilling Co., 511 F.2d 138 (5th Cir. 1974).

On rehearing, it is not possible to determine if those general damages found, but not awarded, by the District Court in the instant case are identical to those enumerated by the Supreme Court in *Gaudet*. Accordingly, the District Court on remand is directed to reexamine its findings of general damages in light of the dictates of the *Gaudet* decision.

The Petition of Canal Barge Company, Inc. to certify the question to the Supreme Court of the United States is denied.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with our previous opinion, 480 F.2d 11, as amended by this order.

The stay of the mandate is vacated.

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United States Court of Appeals
For The Fifth Circuit

October Term, 1971

D. C. Docket No. 6948-K

IN THE MATTER OF THE PETITION OF CANAL BARGE COMPANY, INC., AS OWNER AND OPERATOR OF THE M/V ELAINE JONES, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

CANAL BARGE COMPANY, INC.,
Petitioner-Appellant-Cross Appellee,

versus

MARY KATHRYN GRIFFITH, Individually, and as Administratrix of the Estate of George L. Griffith, deceased,
Respondent-Appellee-Cross Appellant,

TERMINAL RAILROAD ASSOC. OF ST. LOUIS, ET AL.,
Respondents-Appellees.

Appeals from the United States District Court for the Northern District of Mississippi

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R OUGH

Before GODBOLD and RONEY, Circuit Judges, and BOYLE, District Judge.

JUDGMENT ON REHEARING

This cause came on to be heard on petitioner-appellant-cross appellee's motion to vacate order denying petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for proceedings not inconsistent with our previous opinion, 480 F.2d 11, as amended by this order;

It is further ordered that petitioner-appellant-cross appellee pay to respondent-appellee-cross appellant and respondents-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: May 16, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1637

IN THE MATTER OF THE PETITION OF CANAL BARGE COMPANY, INC., AS OWNER OF THE M/V ELAINE JONES, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

IN THE MATTER OF THE PETITION OF CANAL BARGE COMPANY, INC., AS OWNER OF THE M/V ELAINE JONES, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The judgment and opinion of the United States District Court for the Northern District of Mississippi, Greenville Division, is reported at 323 F. Supp. 805; the judgment and opinion of the United States Court of Appeals, Fifth Circuit, is reported at 408 F.2d 11; the judgment and opinion of the United States Court of Appeals, Fifth Circuit, on Petition for Rehearing, is reported at 408 F.2d 34, and the final judgment and opinion of the Fifth Circuit is reported at 513 F.2d 911.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 30, 1973. Rehearing was denied on June 18, 1973, but mandate was stayed pending a decision in *Johnson v. Penrod*, 510 F.2d 234 (1975), and final opinion issued May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), pursuant to

which Canal Barge Company, Inc. filed its Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

This action for wrongful death arises from the October 14, 1969, collision between the M/V ELAINE JONES, owned and operated by petitioner, Canal Barge Company, Inc., and an arch of the Eads Bridge spanning the Mississippi River at St. Louis, Missouri, and connecting East St. Louis, Illinois, with the City of St. Louis.

The collision damages and almost simultaneous death of pilot, George L. Griffith, were precipitated by a combination of bizarre incidences, chief among these was the sudden and unexpected rise of the Mississippi River at St. Louis Harbor which had been occasioned by an unexpected and unprecedented rainfall. A left set or cross-current is encountered in that vicinity only by down-bound vessels and only in periods of high water. The captain of the ELAINE JONES, Vernon Stroschein, was the only wheelman aboard that knew of and had previously encountered this left set.

For reasons best known only to themselves, Captain Stroschein and Earl Ray Daily, Canal's port captain, who was in twice daily radio contact with the ELAINE JONES failed to apprise pilot Griffith of the left set or the proper means of navigating in order to avoid it. Further, at the time pilot Griffith assumed the watch and relieved Captain Stroschein, he inquired of the Captain concerning the idiosyncrasies of the tow as

made up. However, due apparently to Stroschein's limited experience with the tow as then made up he was unable to reply to pilot Griffith's query.

During the intervening twenty-five minutes from the time pilot Griffith assumed the watch until the collision with the Eads Bridge, Captain Stroschein did not inform his pilot of the hazardous left set of which he had knowledge, nor did he instruct Griffith as to the proper method of navigating St. Louis Harbor and thereafter failed to take charge of the vessel when the pilot was clearly making an approach that did not make allowances for the left set.

Prior to the collision with the Eads Bridge, but subsequent to the collision with the Veterans Bridge, Captain Stroschein, apprehensive of the possibility of the loss of his own life or limb, abandoned pilot Griffith in the wheelhouse of the ELAINE JONES and sought the safety afforded on the vessel's stern.

On the day before, the day of, and the day after the collision, when the river was higher, many other boats of the same and lesser sizes and horsepower as the ELAINE JONES safely navigated St. Louis Harbor with mixed tows of both greater and lesser size. Moreover, Captain Stroschein had navigated St. Louis Harbor, down bound, prior to this voyage and had encountered the aforementioned left hand set but failed to communicate this knowledge to pilot Griffith.

ARGUMENTS IN OPPOSITION TO CANAL BARGE COMPANY'S PETITION FOR WRIT OF CERTIORARI

I.

Does The Jones Act And/Or Recovery Under The General Maritime Law Require That Loss Of Future Earnings Calculations Include A Deduction For Future Income Tax Liability?

The District Court found that Griffith had a stable and regular employment as a river pilot, and in the last year of his life his earnings, projected over a twelve-month period, amounted to $11,321.00. While the Court discounted loss of future earnings at a rate of 4%, it did not attempt to calculate the amount of income taxes which Griffith might have paid on such future earnings. The District Court also concluded that Griffith might have reasonably anticipated certain increases in his future earnings and stated that such increases might fairly be calculated at the rate of 2% per year to the end of his work-life expectancy, which the court also discounted at 4%.

On appeal, the Fifth Circuit Court of Appeals, predicated on its opinion in *Johnson v. Penrod Drilling Company*, supra, reversed the Trial Court with respect to the 2% increase in future earnings, stating that the influence of possible inflation or deflation on future damages is too speculative a matter for a judicial determination. However, with respect to the Trial Court's assessment of damages for loss of future earnings without an attempt to calculate possible future income taxes, the Court of Appeals affirmed, stating that:

> "No deduction for income taxes should be made where annual estimated earnings are not clearly above the reach of the middle income scale. *Blue v. Western Ry.*, 469 F.2d 487, 492-96 (5th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3393 (Jan. 10, 1973), (No. 72-972); *In re Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1966), cert. denied, 385 U.S. 1005, 17 L.Ed. 2d 544 (1967); *McWeeny v. New York, N. H. & H. R. R.*, 282 F.2d 34 (2d Cir.) (en banc), cert. denied, 364 U.S. 870, 5 L.Ed. 2d 93 (1960).

The rationale surrounding the disallowance of a deduction of decedent's present and future income tax liabilities, where calculated future earnings do not surpass the middle income scale, lies embedded in judicial cognizance of the speculative character of future tax liability, which is partially predicated on the number of dependent exemptions allowed the wage earner, as well as other exemptions and deductions allowed under the Internal Revenue Code. Further considerations, such as plaintiff's undercompensation for loss of earning power and attorney's fees, which are almost always high in this type of litigation, have been recognized. *McWeeney v. New York, N.H. & H.R.R. Company*, supra; *Petition of Marina Mercante Nicaraguense, S.A.*, supra; *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1968); *Blue v. Western Ry.*, supra; *Higginbotham v. Mobil Oil Corporation*, 360 F. Supp. 1140 (W.D. La. 1973).

The judicial terminology, i.e., "middle income scale", although incapable of any precise designation, is yet intended to be sufficiently flexible in order to

allow moderate fluctuation dependent upon the customarily accepted socio-economic standards of income. Since no precise line may be drawn, the trial court should be afforded wide latitude in assessing what is within the middle income reach. *Montellier v. United States*, 315 F.2d 180 (2nd Cir. 1964). When working with such imprecise and speculative considerations, the ultimate goal is reasonableness. *United States v. Summers*, 351 F.2d 354 (10th Cir. 1964).

Petitioner, Canal Barge Company, asserts that the consideration of income taxes in the calculation of future damages in some cases and not in others is in derogation of the due process clauses of the Fifth Amendment and the equal protection concept embodied therein, but cites no authorities for this proposition. To the contrary, it is submitted that there is a logical and rational classification on the basis of the extent of the tax liability, i.e., increased certainty regarding income tax liability among those above the middle income reach. In other words, in those instances where the income of the deceased is so large that the tax factor would constitute a very significant reduction, then it would be logical to attach some weight to this realization but at the same time ignore it, or at least give it minimal consideration, in those instances in which the tax liability is small by comparison. Moreover, since the ultimate goal is one of reasonableness in an area fraught with speculation, such classification eliminates an area of uncertainty and scarcely amounts to an arbitrary and unreasonable classification in violation of the Fifth Amendment.

Canal Barge Company cites the case of *Simpson v. Knutsen*, 444 F.2d 523 (9th Cir. 1971), for the proposition that the Ninth Circuit requires a deduction of income taxes. However, the Court in *Simpson* simply remanded the matter for a "reconsideration" of the issue in the light of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 357, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), without any suggestion whatsoever as to what rule it would ultimately adopt.

The Third Circuit case cited by applicant, *Domeracki v. Humble Oil & Refining Company*, 443 F.2d 1245 (3rd Cir. 1971), is not actually concerned with the issue before the Court *sub judice*. The Court in *Domeracki* was merely concerned with whether or not a jury should have been given an instruction that awards in personal injury actions are not subject to federal income taxes. Closer to the point at issue here was the following language of the Court:

> "Nevertheless, in the three states and one territory of this Circuit, as in most jurisdictions, the courts hold that the gross earnings of the plaintiff, rather than net earnings after taxes, are admissible as evidence for the jury's consideration in calculating this item of damages. (P. 1250).

It is respectfully submitted, therefore, that the authorities cited by Canal Barge Company hardly fashion a rule in the Ninth and Third Circuits contrary to the time-tested policy as set out in *McWeeny*, supra.

Finally, we might point out that this very same issue has on numerous occasions been made the basis of a

Petition for Writ of Certiorari and this Honorable Court has denied same. *B[illegible]e v. Western Ry.*, supra; *In Re: Marina Mercante Nicaraguense, S.A.*, supra; and *McWeeny v. New York, N.H. & H.R.R.*, supra.

II.

Does McAlister v. U.S. Require The Appellate Court To Affirm Lower Court Findings Of Fact Even Though They Are Not Supported By The Evidence In The Record?

This alleged statement of the issue by petitioner is not the issue at all. Of course, the answer to the question as stated by petitioner is in the negative. However, the real issue, properly framed is: Were the lower court's findings of fact supported by the evidence? To this, the answer is a resounding affirmative. The record is replete with evidence which supports the lower court's findings of negligence with respect to Canal Barge Company, Inc., by reason of both the negligence of Captain Stroschein and the negligence of Canal's Port Captain, Earl Ray Daily. For example, when the tow was made up at Wood River, Illinois, Captain Stroschein was on watch and Griffith did not participate in its arrangement. Griffith did not take the controls until the vessel was in the lock at 11:45 a.m., at which time Griffith inquired about idiosyncrasies of the tow's makeup. Stroschein knew it would take Griffith a period of some minutes after the vessel got under way at full speed to get a feel of the tow. Stroschein was also aware from his own experience that a "left set" just above the Veterans Bridge might be encountered in extremely high water and the force of the cross-current could slide a tow

toward the Illinois shore. He also knew that a downbound vessel and her tow had to be shaped up for safe passage beneath the Veterans and Eads Bridges at least one-half mile north of Veterans Bridge. He further knew that if at that point the flotilla was too far from the Missouri shore, navigation ahead would be imperilled by the limited clearance afforded by the arches of the Eads Bridge in high water, which necessitated passage directly under the middle of the center span of Eads Bridge. Pilot Griffith, on the other hand, did not know of the left-hand set to be encountered directly above the Veterans Bridge, nor was he apprised of its probable existence by Captain Stroschein or Canal's other supervisory personnel. Moreover, when he assumed control at Lock 27, he had inadequate time to get the feel of the tow or otherwise check its steerage before getting too wide in the navigation course, and without warning, he held to that course until the set slid the flotilla to port. Earl Ray Daily, Canal's Port Captain, knew that whenever the river stage at St. Louis Harbor exceeded twenty-two feet, the left set above the Veterans Bridge should be expected and, given that condition, a vessel descending too wide from the Missouri shore would have trouble shaping up to run the bridges.

Although Captain Daily was in twice-daily communication with the ELAINE JONES and was fully aware of her movements and flood conditions existing at the time, he issued no particular instructions to Stroschein or Griffith for navigating the harbor. As the District Court stated, "Canal, through its Port Captain, had privity or knowledge of the navigational hazards in St. Louis Harbor. . ."

It is submitted that the testimony of the expert Leonard W. Thompson would, standing alone, constitute sufficient evidence for the application of the "not clearly erroneous rule" adopted by the Court of Appeals, without reference to the body of additional evidence in the record to support the findings of negligence and unseaworthiness with respect to Canal Barge Company and the ELAINE JONES.

III.

Does Maritime Law Permit The Owner Of A Towboat To Recover Indemnity Or Contribution From The Pilot's Heirs For Damages Caused In A Collision Resulting From The Pilot's Negligence?

This is the issue as framed by Canal Barge Company. However, we also hasten to emphasize that while the Court of Appeals found negligence on the part of pilot Griffith, the liability of Canal Barge Company to the bridge owner was not predicated solely upon this negligence. The Court found numerous acts of negligence on the part of Canal Barge Company by reason of the negligence of Captain Stroschein and of its Port Captain, Earl Ray Daily. Thus, liability of Canal Barge Company necessarily followed, absent any findings of negligence on the part of Griffith. Further, it could not be said that Mr. Griffith's negligence was any more active than was the negligence of Canal Barge Company, Inc. by reason of the actions of its agents and employees other than Griffith. To the contrary, the Appellate Court found negligence on the part of Griffith predicated on constructive knowledge chargeable to him as a matter of

law. To the Court his negligence was generated by his failing to apprise himself of the navigational hazards to which his tow was exposed. By comparison with the negligence of the other agents and employees of Canal Barge Company, the so-called negligence of Griffith would appear to be much more "passive" in nature.

Also, it would be a strange rule indeed for the widow's award to be reduced by the comparative negligence of her deceased husband and then take the balance from her as a contribution to the negligent employer in connection with a claim for property damages resulting from the same accident. The inequity of such a result was correctly analyzed by the erudite Judge Rubin of the U.S. District Court for the Eastern District of Louisiana in *Shiver v. Burnside Terminal Company*, 392 F. Supp. 1078 (1975), wherein the Court spoke to this issue as follows:

> "In short, there is no way in which Getco can recover over against Shiver; to permit such a recovery would be twice to count his contributory negligence."

IV.

Do The Heirs Of A Seaman Have A Right To Recover From The Vessel Owner When The Vessel Was Rendered Unseaworthy By The Presence Of The Decedent Seaman Aboard The Vessel?

Here again, Canal Barge Company has phrased the issue in such a manner as to invite a favorable response. The District Court found that the pilot *and*

master of the ELAINE JONES were unfit to meet the perils reasonably to be anticipated in her voyage through St. Louis Harbor and that the pilot *and* master were unequal in disposition and seamanship to the ordinary man in the calling under like circumstances. This, the Court concluded, citing numerous authorities, rendered the vessel unseaworthy. Thus, it was not only a lack of knowledge on the part of Griffith which caused the vessel to be unseaworthy, but the inadequacies of her master, Stroschein, as well. The Fifth Circuit Court of Appeals held that under the plainly erroneous rule, the findings with respect to unseaworthiness were to be affirmed. Additionally, it should be noted that Griffith never held himself out as having knowledge of the peculiar navigational hazards existing at this particular place and only at certain times. This information was peculiarly within the knowledge of his employer, Canal Barge Company.

Moreover, the continuing operational negligence of the master of a vessel, standing in the shoes of the owner thereof, renders a vessel unseaworthy. *Mahnick v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 1944 A.M.C. 1 (1944); *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 433 (5th Cir. 1967), cert. den. 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146 (1967); *Robichaux v. Kerr, McGee Oil Industries*, 376 F.2d 447 (5th Cir. 1967); *Taylor v. S.S. Helen Lykes*, 268 F. Supp. 932, aff. 402 F.2d 777 (5th Cir. 1968); *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), cert. den. 396 U.S. 1033; *Usner v. Lukenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514 (1970).

Let us suppose that Canal Barge Company had placed the cook at the wheel of the ELAINE JONES. Surely it could not be argued that Canal Barge would then be in a position to obtain indemnity or contribution from the cook because he did not know of the existence of the peculiar situation existing at St. Louis Harbor. Granted, George Griffith was not a cook but an experienced and able mariner. His failing, if it could be classed as such, was simple ignorance of an existing fact or condition, of which his employer had superior knowledge, which knowledge the employer did not communicate to him. Even assuming, arguendo, that the sole basis of unseaworthiness was the lack of knowledge of the pilot Griffith, this would not defeat his widow's cause of action. The role played in this calamity by the pilot Griffith need only stand the test of a comparative negligence evaluation. It is further submitted that the M/V ELAINE JONES was rendered unseaworthy by the abandonment of the wheelhouse by her master, Vernon E. Stroschein, while the vessel was navigating perilous waters. By Stroschein's own admission, while he was abandoning the wheelhouse to seek a position of safety, Griffith remained and took action which avoided a more serious collision between the ELAINE JONES and the bridge, thereby saving the vessel and crew.

V.

Should Seaman's Heirs' Right To Recovery Of Damages For Seaman's Death Include Damage For Loss Of Society?

Another closely related issue asserted by petitioner Canal Barge Company is the following:

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Did Congress enacting the Jones Act in 1920 preempt the field in providing for recovery of damages in death actions of seamen which would prohibit application of *Moragne v. States Marine Lines type of recovery*?

Petitioner Canal Barge argues that the holding of unseaworthiness on the part of the Trial Court and its affirmation by the Court of Appeals is unsupportable and that, therefore, the claim of the Griffith heirs is limited to a Jones Act claim and, a fortiori, limited to pecuniary loss only. We first answer the argument of Canal Barge by strenuously denying that the holding of unseaworthiness is unsupportable, as more fully discussed hereinabove. There is ample support for the finding of unseaworthiness and, therefore, there can be no question but that there is recovery herein under the general maritime law, which includes all of the elements of damages set forth in *Moragne v. States Marine Lines*, supra. One of the primary reasons underlying the *Moragne* decision was the need for uniformity in admiralty death actions. Now petitioner would have the Court revert back to an absence of uniformity by declaring that the heirs of a *bona fide* seaman have less rights than the heirs of a *Sieracki*-type seaman. The *raison d'etre* of *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) was to place shoreside workers who were exposed to the same dangers as seamen in the same position with respect to rights of recovery for personal injury and death, not in a preferred position. Whatever may have been the rule in 1920 at the time of the passage of the Jones Act (46 U.S.C. § 688), the Courts in recent years have allowed recovery by *Sieracki* seamen against vessel owners based on either unseaworthi-

ness or negligence. See for example: *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 1954 A.M.C. 1 (1953); *Boudoin v. Lykes Brothers S.S. Co., Inc.*, 348 U.S. 336, 75 S.Ct. 382, 1955 A.M.C. 488 (1955); *Copeland v. Oil Transport, Inc.*, 362 F. Supp. 11 (S.D. Ala. 1973). Also, the Court will note at 28 F.R.D. 541, Civil Charges 16.06 and 16.07, which are approved jury charges relating to negligence of the vessel owner. It is clear that *Sieracki* seamen had a cause of action under the general maritime law based on a maritime tort, which action has now been reduced to statutory form in the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905. Of course, prior to the decisions of this Honorable Court in *Moragne*, supra, and in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 1973 A.M.C. 2572 (1974), there was no need to draw a distinction between a seaman's cause of action predicated upon negligence under the Jones Act as opposed to the general maritime law. In a personal injury case, there was no need for him to proceed on a negligence basis under the general maritime law, since he had such a cause of action under the Jones Act. On the other hand, in death cases, in the pre-*Moragne* era, since it was thought that the maritime law provided no nonstatutory wrongful death action, the heirs of the deceased seaman had no basis for proceeding under the general maritime law. However, commensurate with the *Moragne* and *Gaudet* decisions, it is indeed to the interests of the heirs of the deceased seaman that they proceed with their negligence cause of action under the general maritime law which, under *Gaudet*, allows a broader recovery than does the Jones Act. To the extent that *Gillespie v. United States Steel Corporation*,

379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) conflicts with *Moragne*, it has been impliedly, if not expressly, overruled. Footnote 12 of the *Moragne* decision states:

> "Likewise, the remedy under general maritime law that will be made available by our overruling today of *The Harrisburg* seems to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, "uniformity in the exercise of admiralty jurisdiction"; and, of course, no question of preclusion of a *federal* remedy was before the Court in *Gillespie* or its predecessor, *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686 (1930), since no such remedy was thought to exist at the time those cases were decided."

There is absolutely nothing in the *Moragne* opinion, or in *Gaudet* for that matter, to indicate that this Honorable Court intended the absurd result espoused by petitioner, Canal Barge Company. To confer upon the heirs of *Sieracki* seamen or of passengers aboard vessels, who also enjoy a negligence cause of action, greater rights than the heirs of seamen, would place the maritime law back into the same morass from which it was extricated by this Honorable Court in *Moragne* and *Gaudet*. This Court also stated in *Moragne:*

> "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate remedial statutes to exclusively maritime substantive concepts . . . such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." (90 S.Ct. at p. 1788).

The following excerpt from the *Sea Gull*, 21 Fed. Cas. 909, quoted in *Moragne*, 398 U.S. 387, 90 S.Ct. at 1781 is pertinent here:

> "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

There is simply no logical reason for withholding from the heirs of the seaman damages for "loss of society" as that term is defined in *Gaudet*.

CONCLUSION

In view of the foregoing arguments and authorities, it is respectfully submitted that petitioner, Canal Barge Company, Inc's., Application for Writ of Certiorari should be denied based upon the following grounds:

A. The jurisprudence initiated by *McWeeny v. New York, N.H. & H.R.R. Company*, supra, and followed by a majority of jurisdictions, proscribes any deduction for income taxes where the annual estimated earnings of decedent are not clearly above the reach of the middle income scale. Accordingly, no deduction for future income tax liability of George L. Griffith is warranted herein.

B. The substantial evidence received in this case ably supports the Trial Court's findings of negligence with respect to Canal Barge Company, Inc. Further, the record of this action clearly indicates that pilot Griffith executed the duties of his employment in a careful and prudent manner in accordance with the dictates of his profession.

C. The general maritime law does not recognize the employer's right of indemnity, for property damages, against the estate of the deceased seaman, for, to do so, would effectively permit the employer's total recovery, via comparative negligence and indemnity, due to the deceased's negligence.

D. The Appellate Court's affirmance of the Trial Court's findings of unseaworthiness was eminently correct since the only information regarding the hazardous con-

ditions existing in the St. Louis Harbor was peculiarly within the knowledge of pilot Griffith's employer, Canal Barge Company, Inc.

E. Recovery by the heirs of seamen include damages for loss of society as that term is defined in *Gaudet*. To preclude such recovery would afford heirs of nonseamen greater rights than the heirs of seamen, thus commencing greater anomalies than those proscribed by *Moragne*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on behalf of Respondent, Mary Kathryn Griffith, have been served upon Robert B. Acomb, Jr., and Edith Brown Clement, by depositing same in United States Mail, postage prepaid, and properly addressed.

LAKE CHARLES, LOUISIANA, this ____ day of September, 1975.

HARRY E. BARSH, JR.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1637

MARY KATHRYN GRIFFITH, Individually, and as Administratrix of the Estate of GEORGE L. GRIFFITH, Deceased,

Petitioner,

VERSUS

CANAL BARGE COMPANY, INC.,

Respondent.

REPLY BRIEF ON BEHALF OF CANAL BARGE COMPANY, INC., RESPONDENT

Canal Barge Company, Inc., (hereinafter referred to as "Canal Barge" or "Canal"), respondent herein, has also filed a petition for certiorari from the decision of the Fifth Circuit Court of Appeals in this case (Docket No. 1641), and Canal Barge adopts its brief in support of the petition by reference herein.

Petitioner Griffith, (hereinafter referred to as "Griffith"), in her application for certiorari sets out in a *State-*

ment of the Case certain essential facts, but her brief is totally in error in many of the facts stated including incorrect transcript pages which do not support these statements. Examples of the errors are:

At brief page 11:

> "When Pilot Griffith came on watch at 11:45 a.m. . . . he the pilot had no prior experience in navigating this particular tow . . ." (T. pp. 498-504).

At brief page 11:

> "The pilot, Griffith, had never before navigated a vessel and tow southbound through St. Louis Harbor in high water" (T. p. 505).

At brief page 11:

> "George Griffith was not sufficiently familiar with the tow to navigate St. Louis Harbor under the circumstances existing . . ." (T. pp. 745-746).

At brief page 13:

> "Due to the characteristics of the tow, i.e. the eight empties and two loads, with the two loads being at the rear of the port string, it was difficult, if not impossible, for Pilot Griffith to either achieve or hold the 'point' necessary to successfully accomplish the planned maneuver. All the while, the stern of the ELAINE continued its rapid swing or 'slide' to port, toward the pier of the Veterans Bridge." (T. p. 759).

GRIFFITH MYTHS REVIEWED

At Appendix 505 we find *no* testimony at all indicating that Pilot Griffith *had never* before navigated a vessel and

tow southbound through St. Louis Harbor in high water, (actually the opposite is true and has been proven. (App. 187, 188, 179-185, 264, 1396, 1401). Further, at Appendix 498-504, there is no reference to any discussion regarding "idiosyncrasies" of the tow, but rather a statement by Captain Stroschein that Pilot Griffith inquired of him, "What kind of drag do we have to starboard?" The Captain replied that he couldn't tell anything about the drag because he hadn't been shoving the tow full ahead.

Appendix page 759 does not reflect any testimony which supports the bold assertion of "fact", nor does it even contain an opinion which states as Griffith would have the court believe: "It was difficult, if not impossible for Pilot Griffith to either achieve or hold the point necessary to successfully accomplish the planned maneuver."

At page 745 we find *not factual* testimony, but opinion testimony by a so-called expert river pilot whose past experience included crashing his towboat into a bridge and sinking the towboat!! It is certainly not proper to refer in a *Statement of the Case* to opinion testimony of a person not even on the vessel at the time of collision.

Confusion has resulted from the incorrect and unsupported findings of fact in the District Court opinion which the Appellate Court chose to affirm improperly under the substantial error rule. This confusion is advanced here by the errors in Griffith's brief.

Canal Barge will not attempt to call this court's attention to each and every factual misstatement in Griffith's brief but will refer to the established facts of this case.

ACTUAL FACTS

The ELAINE JONES, a modern diesel powered towboat of 4300 horsepower was well equipped with the most advanced navigational equipment available in the towing industry. (App. 468, 393). The towboat was fully certified by the United States Coast Guard and the American Bureau of Shipping. (App. 625). The courts have found that at all times the vessel's equipment was completely operational and, in fact, this was unquestioned by any of the parties during the proceedings. (App. 468). The vessel and its tow, consisting of eight empty barges and two loaded barges, departed Wood River, Illinois, southbound at approximately 9:45 a.m. on the morning of October 14, 1969.[1] The tow proceeded south through lock 27 immediately above the St. Louis Harbor. At 11:45 a.m. just prior to departing lock 27, the pilot, George Griffith, came into the pilothouse to relieve the relief-master of the vessel, Vernon Stroschein who had stood the 6-12 watch. (App. 451).

Pilot Griffith, an experienced and able river pilot, had worked in the towing industry as a pilot for almost twenty years, and was familiar with this area of the river. (App. 187, 188, 179-185, 1396, 1401). During his tenure with Canal Barge, he had worked a considerable portion of his time as pilot of the M/V JOSEPH JONES which is the sister ship of the ELAINE JONES of the same dimensions and hull design and approximately the same horsepower. (App. 333-334).

Pilot Griffith stayed at the controls of the ELAINE JONES from 11:45 a.m. until the time of the collision—

[1] The towboat is pilothouse controlled which means that the person navigating the vessel controls both the engines as well as the steering from controls in the pilothouse. At the time of this collision Pilot George Griffith was this person in control of the Elaine Jones.

12:20 p.m.—and was the only person aboard this pilothouse-controlled vessel who was controlling the steering of the entire tow during the time of emergency and collision.

Following the customary procedure employed by Canal Barge, the ELAINE JONES was engaged in the movement of barges to and from various points on the Inland Waterways System. To accomplish this, the Company has a network of towboats which meet each other on the rivers and exchange their tows. (App. 551-552). The ELAINE JONES exchanged tows with another towboat owned by Canal Barge several days before the collision. The ELAINE JONES then brought the tow to Wood River where it added two loaded barges to the tow and departed Wood River at approximately 9:45 a.m. A few days before the ELAINE JONES (with the same crew including Pilot Griffith) had proceeded north through the St. Louis Harbor on October 9, 1969. However, as the ELAINE JONES and her tow approached the St. Louis Harbor southbound on the day of the accident an extremely unusual situation was presented to them in the harbor. An unusual and drastic rise had occurred in the Mississippi River caused by an extremely unusual precipitation pattern that had occurred in the general area commencing on October 10 and continuing through October 13. The gauge in the harbor at St. Louis jumped from 3.2 feet on October 10 to 30.3 feet on October 14—a jump of 27.1 feet in the four days. The effect of this unusual rapid rise in the river was to cause the river to flow in a chaotic and abnormal fashion. However the testimony clearly reflects that the Coast Guard did not feel it necessary to close the river to traffic under the circumstances. (App. 545, 457).

The testimony of Captain Earl Daley (Canal Barge's Port Captain) must be considered at this point:

At Appendix 563:

> "There is a definite flow at the water toward the left because of the fact that the river makes a turn in this area, and the bridges are in this turn although it does not show up as much of a turn. . . .

Further, Captain Daley stated in his deposition which was introduced into evdence as Petitioner's Exhibit 16, regarding the area of the river above Veterans Bridge during high water:

> "It is not a phenomena, it is a pretty steady thing. Any time you have high water say between 20 and 30 feet, you have a left hand set above the Eads Bridge or the Veterans Bridge. *I think every pilot is fairly familiar with that. It is not a hit or miss thing, it is always there*" *(italics added)*.

EXPERIENCE OF PILOT GRIFFITH

The facts established reflect that Pilot Griffith was an experienced river pilot of nearly twenty years service *not* the sophomoric incompetent that Griffith would attempt to portray in her brief. Let us examine the *actual* facts:

(1) The application for employment filled out by Captain Griffith in his own handwriting and contained at appendix page 187 and 188 reflects the following information certified by Pilot Griffith on January 8, 1968, to Canal Barge:

> If master or pilot, what rivers do you run? Miss., Ill., Ohio, Cumberland, Kanawah, Missouri and Columbia —

(2) Answers to interrogatories contained in petitioner's exhibit 17b (App. 179-185) indicates that Pilot Griffith served as a pilot on the company vessels from January 7, 1968, to October 14, 1969, serving on the JOSEPH JONES, SALLY POLK and other company vessels of similar size to the ELAINE JONES. (App. 333).

(3) Pilot Griffith was serving as pilot aboard the JOSEPH JONES when the vessel and tow *went* southbound through the St. Louis harbor on *July 23* and *24*, 1969. At that time, the official engineer's gauge records introduced as exhibit A (App. 264) reflects that the river at St. Louis was at flood stage of 26.5' which is slightly less than 4' lower than it was on the day of this collision.

(4) The testimony of petitioner Griffith establishes that Pilot Griffith went to work for Sabine Towing Company in 1950 and rose within seventeen months to be a wheelhouse employee or pilot. (App. 1375). Griffith stayed with Sabin for 8 years and during that time, worked as a pilot. Later, he went with Inland Navigation Company and then returned to Sabine Towing Company prior to being employed by Chotin Transportation Company. He was employed as a pilot for Chotin for approximately 8 years. (App. 1376-1378).

(5) Petitioner Griffith indicated that during her husband's employment as a pilot on the river, she often picked him up at Memphis, St. Louis, Paducah and Baton Rouge. (App. 1395)

(6) Further, on one occasion, petitioner Griffith rode aboard a Canal Barge vessel with Pilot Griffith from Memphis to Chicago and then back to Memphis. (App. 1396)

(7) Petitioner Griffith also indicated that Pilot Griffith would telephone her from one of the locks above St. Louis and tell her to pick him up in a day or two down at Memphis below St. Louis. (App. 1401)

(8) Pilot George Griffith was hired by Canal's port captain who had been with him on several occasions when he worked as a pilot and he was satisfied with his performance and considered him to be capable. (App. 553)

(9) George Griffith served on the JOSEPH M. JONES most of the time and that vessel was almost identical with the ELAINE JONES except the ELAINE JONES had 600 more horsepower. (App. 555)

(10) From August of 1968 until October of 1969, George Griffith was the pilot of the JOSEPH M. JONES and operated the vessel between Port Sulphur, Louisiana and Joliet, Illinois which would require him to pass through the St. Louis harbor every ten days to three weeks. (App. 555-556)

(11) Pilot Griffith was considered by Canal's marine superintendent to be one of the company's better wheelhouse personnel from the standpoint of experience and ability and was considered a top pilot. (App. 365)

CAUSE OF COLLISION

The only eye witness to the navigational maneuver that was made by the ELAINE JONES prior to the collision is found in the testimony of Captain Vernon Stroschein. His testimony is clear, unambiguous and unshaken after long and exhaustive cross-examination following one Coast Guard hearing, two discovery depositions and the trial testimony. His testimony at App. 469 was as follows:

"Did you have an opinion as to what caused the collision with the Veterans Bridge and subsequently with the Eads Bridge?

Answer: the set in the current that set us to port in the current and the oversteering on Captain Griffith's part is what caused the collision with the Veterans Bridge."

At App. 470, Captain Stroschein testified unequivocally that after the ELAINE JONES came into contact with the Veterans Bridge, that *no one* could have done anything to prevent a collision with the Eads Bridge. He described the collisions as being mere seconds apart.

The ELAINE JONES being a pilothouse controlled vessel was solely and exclusively under the control of Pilot Griffith who was at the controls in the pilothouse on the approach to the bridges and was the only person aboard the ELAINE JONES that controlled the steering of the vessel. Captain Stroschein testified at App. 467 that Pilot Griffith knew of the unusual rain that had occurred and that the river in the St. Louis Harbor had risen almost fifteen feet in one night. And then he testified as follows:

"Q. Do you know whether or not Mr. Griffith knew of the weather conditions in the St. Louis Harbor?

A. Yes, Sir, he knew.

Q. How do you know that?

A. It was — we had talked about the water rising so fast."

At App. 459 he testified:

A. Everything was going in a normal manner; he was shaped up as he should be.

Q. When did you first become alarmed that there was any possibility of danger?

A. When the tow was almost through the Veterans Bridge, and we were still swinging at the left-hand pier of the Veterans Bridge.

Q. And in relation to the pier of the Veterans Bridge, how far was the tow of the ELAINE JONES at that point?

A. How far about it?

Q. How far above it, below it, or wherever it was, what was the distance if you can estimate it?

A. Roughly one hundred fifty feet above the bridge.

Q. The bow of your boat was one hundred fifty feet above the Veterans Bridge; is that correct, sir?

A. Yes, sir.

Previously at App. 451, Captain Stroschein described Pilot Griffith's maneuvers before the collision and stated:

> ". . . and he steered up to the starboard to compensate for the port set, and in so doing, he oversteered and hit the left channel pier of the Veterans Bridge near the port stern of the ELAINE JONES, knocking the boat out of tow. The tow continued to set to starboard, the bow of the tow did, and the stern of the tow continued to set to port. . . . When we hit the Veterans Bridge with the stern of the boat, breaking the port side out,

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> the pilot came to neutral and started reversing the engines, and at that time I left the wheelhouse and ran to the old—one level and he left shortly behind me. . . ."

This testimony is the only evidence in the record by an eye witness regarding the collision. No expert later *guessing* at what happened could furnish the Court more credible evidence than the testimony of the man actually standing in the pilothouse with the Pilot Griffith—who was at the controls.

Captain Stroschein testified that he returned to the pilothouse after having his lunch and at that time the ELAINE JONES tow was about a mile upriver from the two bridges. At that time everything looked normal to him. The first time there was any danger of a collision was when the tow was going under the Eads Bridge, and at that time the stern of the ELAINE JONES touched the Veterans Bridge. (App. 455-459). It is obvious that if Pilot Griffith was not negligent in steering the ELAINE JONES tow in the St. Louis harbor, then no one was negligent in this collision! Similarly, if he was negligent, then this negligence must mitigate petitioner's claim for recovery of damages for his death.

Petitioner's attorney asked Captain Stroschein the following question (App. 523):

> "Q. Why didn't you stay in the wheelhouse and navigate this harbor as Master of the vessel? Why did you turn the boat over to your pilot with whom you had never crewed and gone casually to lunch in the face of these conditions?
>
> A. I had full confidence in his ability.

Q. Isn't it true, Captain, that you felt him to be a superior pilot to yourself?

A. I don't know if I considered him any better pilot than I was; I knew he had more experience with that type of boat than I did. If that would have made him more qualified, then he was more qualified."

Thus, Pilot Griffith, the only party at the controls, and the only party whose steering brought the tow into collision with the two bridges was, as the result of his actions, guilty of negligence both as a matter of fact and a matter of law. It was his negligence alone that was the sole cause of the collision.

ERRORS OF DISTRICT COURT COMPOUNDED ON APPEAL AND STILL BEING URGED BY GRIFFITH IN BRIEF

Canal Barge shows that numerous errors of fact were committed by the District Court and ignored by the Appellate Court under a mis-application of the "*Clearly Erroneous*" rule.

Glaring errors, among others, of the District Court in findings of fact are as follows:

> *"Evidence does not reveal that Griffith piloted St. Louis Harbor with high water on other occasions (App. 1440) . . . Griffith did not know of left hand set (App. 1441). Pilot Griffith misgoverned vessel (App. 1461). Pilot Griffith unfit and unequal to be a seaman (App. 1462) . . . Pilot Griffith made downbound approach too wide (App. 1435) . . . No evidence Griffith knew of conditions in the river (App. 1466)."*

The District Court's finding on these points is clearly contrary to the evidence in the record, and there is no proof that would establish a lack of knowledge on Pilot Griffith's part regarding the set in the river in the vicinity of the bridges during high water. Also, there is no proof in this record which in any way could support the trial judge's opinion that Pilot Griffith and Captain Stroschein were unfit and unequal to the calling of seamen generally. The exact opposite is true. They were both men of long experience and had never been involved in a collision. (App. 552-553)

This Court may question where the erroneous findings originated. Unfortunately, Canal Barge is unable to answer this mystery since the District Court in Greenville imposed a local unpublished rule that all Finding of Fact submitted by the litigants at the conclusion of the trial were not to be exchanged between the parties and consequently they were not subject to objection and/or correction before being adopted.

Canal Barge has shown unequivocally that the only evidence of eye witnesses remains unrebutted in the record, and also remains totally ignored by the opinion of the trial court. Over and over again, the witnesses in this case have testified that Griffith knew of the weather conditions (App. 467, 568). Further, Captain Daley in his deposition, introduced as Claimant's Exhibit 16, testified at page 18:

> "Answer: It is not a phenomenon, it is a pretty steady thing. Any time you have high water, say between 20 and 30 feet, you have a left hand set above the Eads Bridge or the Veterans Bridge. I think every pilot is fairly familiar with that. It is not a hit or miss thing, it is always there."

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Moreover, the testimony is clear and unequivocal that riverpilots by use of the radios on the towboats always obtain weather conditions and weather information directly from the source, i.e. weather bureau reports, and from the locks and other boats on the river. (App. 340-342, 456-457, 628-629). George Griffith, in this case knew of the set in the river and also knew about the harbor conditions. (App. 467).

The trial court felt Captain Stroschein was guilty of negligence by abandoning the wheelhouse of the ELAINE JONES in face of danger. (App. 1461.) Yet, Captain Stroschein stated that he only left the wheelhouse after a collision was inevitable and only seconds *before* Pilot Griffith departed the wheelhouse. The facts clearly established that once the stern of the ELAINE JONES collided with the pier of the Veterans Bridge, nothing could be done by anyone in the pilothouse to avoid the collision.

How can the master be negligent for leaving the pilothouse seconds before the Pilot and the pilot *not* negligent for doing the same thing?

The tow of the ELAINE JONES on this occasion was almost substantially the same tow that had been operated by the ELAINE JONES several days prior to the collision and the pilot, Mr. Griffith, had every opportunity to get the feel of the tow previously. (App. 551-552). Moreover, the company normally exchanged tows between its towboats, and Griffith, during his many years of experience with the company, had the feel of this or similar tows on many other occasions. To support the findings that the master was negligent, the Trial Court relies upon *many* irrelevent cases *none* of which in any way support the present legal situation. In fact, every case is so totally in-

applicable to the present case, that it is amazing that they are even relied upon in the Trial Court's opinion. For instance, in *Davis v. Parkhill-Goodloe Company*, 302 F.2d 489, a 24 year old Georgia farmboy engaged in a nautical career for ten days was the one instructed rather than an experienced pilot of 18 to 20 years experience on the river. Likewise in the case of *Pioneer Steamship Company v. Hill*, 227 F.2d 262, this case involved a shipfitter's helper who fell through a hole in the deck, and had nothing to do with the pilot. In *Sylve v. Gravolet Canning Company*, 278 F.Supp. 669, (E.D. La. 1967), a crew member, described by one witness as mentally retarded, was never given instructions relative to starting a bilge pump. Yet the Trial Judge cites all of these cases to support the proposition that the master of the ELAINE JONES was negligent and failed to properly instruct an experienced and seasoned pilot about conditions of the river that the pilot already knew about and about the condition of the tow that the pilot already knew existed since he himself had piloted the tow for several days and for thirty-five minutes before the collision with the exact barge make-up present in the tow.

Again the District Court improperly cites as authority for holding that Captain Stroschein was negligent in abandoning the wheelhouse, the case of *Farmer v. O S Fluffy D*, 220 F.Supp. 917 (1963), which involved a shrimp boat captain who jumped off of his vessel during a knife fight provoked by himself.

The District Judge, in holding the port captain of Canal Barge privy to the negligence in failing to give Grffith instructions and information relative to the weather conditions cites the case of *Continental Insurance Company v. Sabin Towing Company*, 117 F.2d 694 (5th Cir. 1941),

which is an interesting case in holding a shipowner responsible for negligence for improper repairs made aboard a vessel under the personal supervision of the officers of the company. How that case has any relevancy to the present situation is beyond Canal Barge's comprehension.

However, the case clearly applicable to the instant situation is the Sixth Circuit Court of Appeal's decision in *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), wherein this exact point was discussed by the Court. The District Court found United States Steel's land office to be negligent in failing to give instructions to its master aboard a sinking vessel by radio and to intervene and countermand the master's orders when he decided to beach the vessel. In reversing, the District Court stated in its opinion as follows:

> "We are not prepared to hold, however, that company officials *sitting hundreds of miles away* had the obligation under the facts of the case to make a decision as to the best course of action to be taken and to countermand the orders of the master who was on the scene and in the middle of the emergency. . . . There was no duty for the owner to speak or otherwise interfere with the authority of the master of the vessel under these facts." (Italics added.)

ERRORS IN APPELLATE COURT RELIED ON BY GRIFFITH

The Appellate Court opinion at Page 10 cites findings of fact relative to the negligence of Captain Stroschein which were *tendering to his pilot a tow without affording him an opportunity to get the feel of the tow . . . failing to inform the pilot of a hazard to navigation of which he*

had knowledge . . . failing to instruct his pilot as to the proper method of navigating St. Louis Harbor . . . failing to take charge when the pilot plainly misgoverned the vessel . . . abandoning the wheelhouse in the face of danger. . . .

The startling fact is that only Pilot Griffith and Captain Stroschein were the witnesses in the pilothouse from which any testimony in regard to the foregoing findings could have been obtained. Since Pilot Griffith was deceased, then it is only the testimony of Captain Stroschein that could support any finding of fact regarding the foregoing.

The Court indicates further that the finding of negligence based upon *failing to inform the pilot of a hazard to navigation of which he had knowledge was so obviously correct to require no comment.* No comment is made by the Court but there is no testimony to support such a broad statement. Rather, let us look at the actual testimony of Captain Stroschein at App. 467:

"Q. Do you know whether or not Mr. Griffith knew of the weather conditions in the St. Louis Harbor?

A. Yes, Sir. He knew.

Q. How do you know that?

A. It was—we had talked about the water rising so fast."

Furthermore, on cross-examination at App. 503 Captain Stroschein testified regarding his "feel of the tow":

"Q. In other words, you hadn't had an opportunity to get a feel for it because of the conditions

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that you had from Wood River slow through the harbor and right into the Chain of Rocks Canal, really hadn't had any experience with it yourself, had you?

A. No, Sir."

Yet the opinion affirms a finding that the Captain was negligent for having turned over the tow to the pilot knowing that a dangerous situation was 30 to 40 minutes downriver and not giving the pilot an opportunity to get the feel of the tow. The only direct testimony from Captain Stroschein is that he also had not had the feel of the tow during this intervening period of time since he was on duty and therefore it is respectfully suggested that the Court must critically look to the supposed super-expert produced by the Terminal Railroad Company who interjected this opinion testimony into the record. Also consider the fact that this so-called expert was himself a captain who had collided with a bridge *sinking* his towboat and had limited experience in the area of navigating integrated tows (App. 813, 807). This is the type of expert testimony relied upon in the District Court to condemn the actions of a Captain who never had a collision while he was at the control of any towboat.

In fact, even this expert admitted that Canal's integrated tows could be handled by pilots who would know their feel of them faster because of experience. At Appendix 816 the following was asked:

"Q. Yes, sir; in other words, if a company has certain tows that are always run together, five or ten barges together and they are exchanged by the company boats up and down the river, this is more or less the standard tow, he can get a

feel for that tow faster than someone could get where you have thirty barges one day, forty barges the next day, and various barges of all different sizes, lengths and shapes and widths, isn't that correct?

A. If a pilot has had experience with one certain type of tow at all times, he should be able to get the feel so to speak a little faster than the man that operates on different (498) sized tows and of a different type barge."

Throughout Captain Stroschein's testimony he clearly indicated that the oversteer on the part of Pilot Griffith occurred just a matter of seconds before the collision with the Veterans Bridge . . . not time for anyone to intervene!! (App. 510, 540) Further, the opinion condemns the Captain for abandoning the pilothouse in the face of danger, but the testimony is also quite clear that from the time the collision occurred with the Veterans Bridge it was inevitable that the towboat was coming into collision with the Eads Bridge, and he left seconds before Griffith. And at App. 526 Captain Stroschein was asked:

"Q. Why did you leave the wheelhouse?

A. It appeared—it look certain that collision with the Eads Bridge was coming up.

Q. It didn't enter your mind that there was something that could have been done to avoid striking the pier and the Eads Bridge?

A. Not that *I could do.*

Q. But it was your judgment you couldn't think of anything, there was nothing you could do about it?

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A. Other than back the engines."

The witnesses testified that the entire maneuver to back the engines was the only thing done by Pilot Griffith because the rudders stayed in the same position that they were at the time of the collision with the Veterans Bridge and therefore a matter of two or three seconds was all that was required to change the control from full ahead to full astern and a matter of ten to twelve seconds would be all that was required for the engine revolutions to change from full ahead to full astern. (App. 525-526, 539)

The opinion also indicates that Canal has not contended that Captain Stroschein was not guilty of negligence in failing to take charge when the pilot plainly misgoverned the vessel. However, it is submitted that Canal has never acquiesced in the fact that Captain Stroschein should have intervened and taken over the wheel from Pilot Griffith. (App. 533) How can a person in a matter of seconds thrust aside a pilot from the controls of a towboat when in just a matter of a few seconds the pilot oversteers the vessel and brings the stern of the towboat into collision with the bridge when at that very instant the head of the tow is already passing under a second bridge further downriver??? (App. 510, 540) The testimony is uncontradicted and clear that once the collision occurred at the Veterans Bridge there was nothing that could have prevented a collision with the Eads Bridge. Any other assumptions or opinions are mere speculation unsupported by any thread of evidence. (App. 515, 521-526, 538)

Further, the finding of negligence on part of a Port Captain hundreds of miles away is sustained under the clearly erroneous rule but yet this finding creates a *monster of potential liability* that is unreasonable and too harsh

for shipowners to bear. The evidence is quite clear that the pilot and the master had ample opportunity to learn of the weather conditions and the existing current in the area and did obtain this information prior to the collision. (App. 338, 340-341) Their knowledge and the navigational and radio equipment made instant weather information completely available to them. Each time the tow went through a lock the weather conditions downriver were posted on the board of the locks. They further were in constant communication by radio with the other tows on the river and therefore could acquaint themselves with wind, rain and current conditions by the mere turn of a dial.

To place upon a shipowner the obligation of having a Port Captain hundreds of miles away call every vessel owned by that shipowner and state to experienced and seasoned pilots that they are coming into an area of some known hazard and they should therefore do thus and so would be to create an impossible duty. How can any supervisory employee look over the many miles and substitute his judgment for the judgment of experienced and trained experts who are operating tows on the river. . . . It is respectfully submitted that the Sixth Circuit in *United States Steel Corporation vs. Fuhrman*, supra p. 16, clearly struck down this erroneous concept and reached the correct result that shipowners do not have such a duty. The pilot at the controls is the one in control of the navigation of his vessel, and the pilot alone must control the navigation and no one on shore can tell him how to navigate against known and obvious hazards because it is only the pilot who is observing his tow's reaction to the river conditions.

GRIFFITH BREACHED HIS DUTY OWED TO HIS EMPLOYER AND THIS CONSTITUTED NEGLIGENCE ON HIS PART

The Appellate Court correctly ruled that Pilot Griffith, the only person navigating the ELAINE JONES tow was negligent in causing this collision.

In *Atlee v. Northwestern Union Packing Company*, 21 Wall 389, 22 L.Ed. 619, the United States Supreme Court stated:

> "But the pilot of a river steamer, like a harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Banks, towns, landings, its houses and trees, and its opening between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all of these external objects, especially in the night. He must be familiar with all dangers that are permanently located in the course of the river, as sandbars, snags, sunken rocks, or trees, or abandoned vessels or barges. All this he must know and remember and avoid . . ."

As the Court stated in *Al Johnson Construction Company v. The S.S. RIO ORINOCO*, 249 F.Supp. 182 (E.D. Pa. 1965):

> "An experienced pilot is presumed to know prevailing channel conditions and is expected to be prepared for an *emergency situation* such as severe bank suction and resulting sheer which may confront him in the course of his duties."

Further, in *The Severance*, 152 F.2d 916 (4th Cir. 1959) the Court stated:

> "We must presume here that Captain Dosher either knew or by the exercise of reasonable care should have known, of the prevailing conditions on the Cape Fear River. *By undertaking to act as pilot of the Severance, he promised the skill of his art.*" (Italics added.)

Thus, a pilot is required by law to perform his duties with a high degree of skill. His employer can expect that he will discharge his duties properly and a breach of this obligation will constitute a breach of his contract of employment.

In *Walker v. Lykes Brothers S.S. Co.*, 193 F.2d 772 (1951), Judge Learned Hand stated in his opinion:

> "The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty toward the wrongdoer, and a duty which the injured person has consciously assumed as a term of his employment. *By contributory negligence which results in no more than reducing the amount of an employee's recovery, the Act means the first; the second is a bar to any recovery. . . .* Thus, if the plaintiff failed to repair the catches, although he was able to do so, his failure was not only contributory negligence in the first sense, but also a breach of his duty to the defendant which barred his recovery absolutely." (Italics added.)

Later, in *Reinhart v. United States*, 457 F.2d 151 (9th Cir. 1972), the Court in its opinion stated as follows:

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> ". . . . then Circuit Judge John M. Harlan distinguished *Walker v. Lykes:* '. . . Those cases are only instances of the *firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship.* Their result turns really not upon any, question of 'proximate cause', 'assumption of risk' or 'contributory negligence' *but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.* . . . Quite correctly and consistently with *Walker* we held that the rule of that case did not apply because there was no proof that libelant, as Third assistant Engineer, had the duty and responsibility to maintain the electrical system, including the switch box, in repair. . . ."

Griffith, an able and experienced river pilot, alone had the duty to know the river and to properly navigate the tow of the ELAINE JONES. He alone had the "*key*" to prevent the collision but he failed to use it. This he failed to do and in this regard he was guilty of the *sole* negligence in causing the accident. In a sense his actions can be equated to the deceased seaman in *Schlichter v. Port Arthur Towing Company*, 288 F.2d 801 (5th Cir. 1961) wherein the Court stated:

> "The doors had been locked by Schlichter—or one of his cohorts at his direction. Schlichter had the key. He was management's sole representative to determine when and what doors were to be locked. For what appears to have been good

> reasons — certainly plausible ones — he decided that all access doors on the main deck should be secured.
>
> Unwittingly he may have sealed his own fate in that decision. Since he alone could make these decisions, and he alone took the decisive action, neither he nor those who claim through him can assert that the vessel owner had a duty to have someone there to supervise him in the performance of the limited task which fell to his lot as the sole occupant of the tug under the permissive arrangement allowed by the owner."

This Court recently in *United States v. Reliable Transfer Co., Inc.*, 44 L.Ed.2d 251, 262 (1975) stated in its opinion:

> "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and their liability for such damage is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."

While that opinion is in reference to collision liability between vessels, the same results should apply when a pilot is at fault.

Further, this Court in *Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106, 40 L.Ed.2d 694 (1974) stated:

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as

> its underlying rationales. The interests of safety dictate that when two parties 'are both in fault' they should bear the damage equally to make them more careful."

Canal Barge seeks indemnity from Griffith's Estate under the doctrine enunciated in the case of *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drill Company*, 410 F.2d 178 (1969) wherein the Court stated:

> "As we have already indicated, maritime law provides for tort indemnity where there is no negligence or only passive negligence attributed to the indemnitee . . . The views expressed in this opinion, therefore, require that we remand the case for a determination of whether there was active or primary negligence committed by Delta Marine (as opposed to passive, vicarious, or secondary negligence) and if so, whether such negligence was also, along with the negligence of Tri-State, a proximate cause of the accident."

Under the Maritime Law the active negligence involved in this case can only be the negligence of Griffith and any negligence on Canal Barge's part would be purely negligence of a passive nature. Under these circumstances, Canal Barge is entitled to indemnity in full from the Estate of Griffith or at least a set off for this amount.

PETITIONER HAS FAILED TO SHOW THAT DISTRICT COURT'S ASSESSMENT OF GRIFFITH'S LIVING EXPENSES WAS CLEARLY ERRONEOUS

The Appellate Court affirmed the District Court's finding that the deceased would have consumed 25% of his earnings had he lived. This Court in *Sealand Services v.*

Gaudet, 414 U.S. 573, 39 L.Ed.2d 9 (1975) stated in its opinion:

> As in all damages awards for tortious injury, "[i]nsistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience," *Whitaker v. Blidberg Rothchild Co.*, 296 F.2d 554, 555 (CA4 1961).

The problem has been summarized in the case of *Petition of Marina Mercante Nicaragues S.A.*, 248 F. Supp. 15, 27 (1965) wherein the Court stated as follows:

> "While the claimant's mathematically precise formulas have a neat surface appeal, the Court cannot accept them. They rest upon the assumption that a father's income is apportioned and distributed equally on a dollar for dollar basis among all the members of a family—parents and children—and totally disregrad the true family relationship. This attempt to determine future earnings by regarding each member of the family as a mathematical digit is quite unrealistic. There are already enough great imponderables in calculating these matters without engaging in loose reformulas. The damage determination does not lend itself to precise determination in the manner of an apothecary filling of prescriptions; at best it represents an empirical judgment based upon the evidence in each case, practical experience and common sense. The Court finds that the amounts of contribution and ensuing damages sustained by the beneficiaries of the deceased vary according to the number of chiidren who are minors at given periods. In the instance of five children and a wife, the amount of contribution

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> of which they have been deprived can reasonably be fixed at 83-1/3%; four children at 80%; three or two children at 75%; one child at 66-2/3% and where the wife is the sole beneficiary, at 50%. Understandably, no particular pattern emerges from the various cases. In *Meehan v. Central Railroad*, 181 F. Supp. 594, 620, a varying allocation according to the number of minor children was applied ranging from 83-1/3% when there were five minors in the family and 50% for the wife alone. See Also *O'Connor v. United States*, 269 F.2d 578, 583 (2nd Cir. 1959) one child 66-2/3%, wife alone—50%; petitioner, *Moore-McCormack Lines, Inc.*, 184 F. Supp. 585, cert. den. 368 U.S. 989, 2 children—75%, to wife alone 50%; *Jennings v. United States*, 178 F. Supp. 516 (4th Cir. 1961) 4 children—75%, wife alone 50%."

The Trial Court apparently heard convincing and credible evidence that decedent's expenses amounted for 25% of his earnings and this finding was affirmed by the Appellate Court; accordingly, this is not a proper matter for further review by this Court since it was found to be not clearly erroneous.

In *Complaint of Farrell Lines, Inc.*, 389 F. Supp. 194, 199 (S.D.Ga. 1975), the court stated as follows:

> "In awards under the Death on the High Seas Act deductions for expenses have been made for food, clothing, pocket money, mortgage payments and cost of public utilities. See 16 A.L.R. Fed. §21 at p. 717. Under general maritime law, courts have used percentages ranging from 15% to 41-2/3%. See for example *Neal v. Saga Shipping Co.*, 407 F.2d 481, 488 (5th Cir. 1969) and *In Re Sincere Navigation*, 329 F. Supp. 652, 659 (E.D. La. 1971).

In *Neal v. Saga Shipping Co.*, *supra*, 407 F.2d at 488, the Trial Court deducted 30% for the personal expenses of a longshoreman. The Fifth Circuit held that this presented a factual question which was not to be determined solely by precedent, however, the percentage figure thus allowed was determined to be consistent with the jurisprudence: *see*, e.g. *Gardner v. National Bulk Carriers*, 221 F. Supp. 243 (E.D.Va. 1963), *aff'd per curiam*, 333 F.2d 676 (4th Cir. 1964), in which a total deduction of 41-2/3% from decedent's gross annual earnings was allowed for living expenses of decedent, a seaman who spent the greater portion of each year away from home.

It is submitted that both lower courts were correct in their appraisal of the facts in determining that decedent's needs amounted for 25% of his earnings.

INFLATION ISSUE WAS PROPERLY DECIDED BY APPELLATE COURT

Griffith's contention that because the Trial Court in Finding of Fact No. 21 did not characterize the two percent per year damage increment as being compensation for an inflationary trend, this increment should be allowed based upon the anticipated future increases in Griffith's income, is baseless. A trier of fact should not be permitted to take into account anticipated future increases in wages because to do so constitutes speculation and rank conjecture that defies accurate or even substantially accurate predictability. Griffith's attempt to distinguish this two percent increment as being unrelated to an inflationary trend was perhaps unknowingly anticipated by the Fifth Circuit's decision in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 241 (5th Cir. 1975), *cert. applied for*, 43

U.S.L.W. 3684 (U.S. June 24, 1975), wherein an en banc court specifically stated that the trier of fact should not take into account future inflationary or deflationary trends in computing future lost earnings, nor should they be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index. The Fifth Circuit indicates that "anticipated future increases in wages" and "cost of living increases" should be disregarded as alternative descriptions of inflationary trends.

The argument advanced by Griffith on anticipated future increases in wages was also made in *Law v. Sea Drilling Corp.*, 510 F.2d 242 (5th Cir. 1975), and was accepted by the Trial Court in its findings of fact (Law argued that he could reasonably expect to increase his income based on a continued rise in income as reflected by his position and income tax returns); however, this finding was correctly reversed by the Fifth Circuit which held that such an inflationary cost of living increase in damages is not recoverable.

It is an obvious fact of life that the normal worker engaged in physical labor decreases in productivity and earnings with advancing years well prior to the termination of his work life expectancy, both as a result of decreasing financial needs and a decreasing ability to perform on a regular, full-time basis the tasks of his employment. Accordingly, Griffith's contention that the two percent per year damage increment should be allowed as a recognition of anticipated annual increases in wages should be disregarded.

In *Johnson v. Penrod Drilling Co., supra*, 510 F.2d at 241, the Fifth Circuit Court of Appeals expressly disap-

proved any attempt to take into account, in computing future lost earnings, *inflationary trends* in the nation's economy . . . since the influence on future damages of possible inflation or deflation is *too speculative* for judical determination. This decision is in harmony with the dictate of this Court in *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916):

> "When future payments or other precuniary benefits are to be anticipated the verdict should be made up of their present value only."

It is imperative and elementary that a damage award for future losses should be reduced to its present worth because the money will be received presently and once received it is capable of earning interest into the future. See *Chesapeake & Ohio Railway v. Kelly, supra; Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967). Obviously, this discount to present value, as required by the Supreme Court in *Kelly, supra*, would be obviated if inflation were allowed to offset the discount.

The Supreme Court's decision in *Kelly, supra*, has been reflected as the established jurisprudence in the 1936 Restatement of Torts, §924, at pages 634-635:

> "In ascertaining the present worth of the future loss of earnings, that is, in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the current return upon long-term investments if the prospective losses are long continued."

The future inflationary trend in the value of money is necessarily unknown and, consequently, always renders present damages for future loss conjectural. This Court's

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mandate in *Kelly* regarding "present value" was followed in the Fifth Circuit's decision in *Johnson v. Penrod*, supra. In order to achieve reasonable certainty and to promote the efficient administration of justice, such forecasting has been eliminated and placed beyond the pale of judicial evaluation; rather, damage awards are to be based on current dollars at current discount rates. Future earnings are to be reduced to present value by use of an appropriate interest rate prevailing at the time and place of trial. *Johnson v. Penrod, supra*, 510 F.2d at 237.

The *en banc* decision in *Johnson v. Penrod*, following the dictates of this Court in *Kelly*, is supported by decisions in most other circuits. In *McWeeney v. New York, New Haven & Hartford Railroad Co.*, 282 F.2d 34, 38 (2nd Cir. 1960), *cert. denied*, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed. 2d 93 (1960), the Second Circuit commented upon the impact of inflation:

> "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, §25.11 (1956).

Similarly, the Sixth Circuit in *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305 (6th Cir. 1969), cited the Supreme Court decision in *Kelly* as controlling and went on to observe:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influence on future damages as inflation and deflation." 414 F.2d at 308.

This position was reaffirmed by the Sixth Circuit in its decision in *Petition of U.S. Steel*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 947, 91 S.Ct. 1649; *cert. denied*, 402 U.S. 987, 91 S.Ct. 1660; cert. denied, 402 U.S. 987, 91 S.Ct. 1665, *reh. denied*, 403 U.S. 924, 91 S.Ct. 2227; *reh. denied*, 403 U.S. 950, 91 S.Ct. 2247, involving claims arising under the general maritime law. There, the Court stated:

> "It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). It is equally well settled in this Circuit that *the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)," 436 F.2d at 1280 (Emphasis added)

The legal conclusion that the present worth formula of *Kelly, supra*, was conceived and devised to prohibit inflationary considerations and that it requires the present value of money to be the proper basis for damages, is further supported by the following circuit decisions: *Williams v. United States*, 435 F.2d 804 (1th Cir. 1970); *Yodice v. Koninklijke Nederlandsche Stoom Maat*, 443 F.2d 76, 78 (2d Cir. 1971); *Magill v. Westinghouse Electric Co.*, 464 F.2d 294, 301 (3d Cir. 1972); *Frankel v. Heym*, 321 F.Supp. 1331, 1346, (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972); *Hoffman v. Sterling Drugs, Inc.*, 484 F.2d 132, 143-144 (3rd Cir. 1974), and discussed on remand at 374 F.Supp. 850, 852-855 (M.D. Pa. 1974); *Furumizo v. United States*, 245 F.Supp. 981, 1013 (D. Hawaii 1965); *aff'd*, 381 F.2d 965, 971 (9th Cir. 1967).

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Griffith further contends that the controlling decision of *Johnson v. Penrod* is irreconcilable with other decisions to the effect that consideration may be directed to the possibility of inflation in fixing damages. The cases cited in support of this contention are easily distinguishable in that they are merely diversity of citizenship cases, which do not involve maritime or federal law, or they are decisions of the Fifth Circuit prior to *Johnson v. Penrod* and, hence, overruled by that decision as was *Law v. Sea Drilling Company, supra.* The Fifth Circuit has discussed this very problem in its recent decision of *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975), which is a personal injury diversity suit tried under Texas law in which evidence of future inflaton was admitted on the issue of future damages under the *Erie* doctrine, and state law was held to govern the measure of damages. The *Weakley* court, 515 F.2d at 1266, 1267, then went on to state its application of the *Penrod* case as follows:

> "This Court has writ large its disapproval of calculating future damages by reference to predictions of future inflation. Johnson & Starnes v. Penrod Drilling Co., 5 Cir. 1975, 510 F.2d 234 (en banc). Numerous other federal decisions are to the same effect. See Williams v. United States, 1 Cir. 1970, 435 F.2d 804; Petition of United States Steel Corp. v. Lamp, 6 Cir. 1970, 436 F.2d 1256, cert. denied 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153; Sleeman v. Chesapeake & Ohio Ry. Co., 6 Cir. 1969, 414 F.2d 305; McWeeney v. New York, N.H. & H. R.R., 2 Cir. 1960, 282, F.2d 34. These cases all, however, involved claims asserted on federal causes of action. Here, on the other hand, we are controlled by *Erie*. This and other federal courts have concluded that under *Erie* state law governs the measure of damages, including the admissability and jury considera-

> tion of evidence of inflation. See New Amsterdam Casualty Co. v. Soileau, 5 Cir. 1948, 167 F.2d 767, cert. denied, 335 U.S. 822, 69 S.Ct. 45, 93 L.Ed 376. Accord Magill v. Westinghouse Electric Corp., 3 Cir. 1972, 464 F.2d 294; Willmore v. Hertz, 6 Cir. 1971, 437 F.2d 357; Tullos v. Corley, 6 Cir. 1964, 337 F.2d 884. See also Rule 43(a), Fed. R. Civ. P.

The Fifth Circuit has confirmed its *Penrod* holding that an inflationary compensation award made on the ground that such an adjustment, to compensate for the effects of projected inflationary trends, is too speculative to be included as an element of damages: see *Standefer v. United States*, 511 F.2l 101, 107 (5th Cir. 1975). Further- in *Robertson v. Delta Steamship Co.*, 510 F.2d 829, 837 (5th Cir. 1975), the Fifth Circuit explained that:

> "Although some confusion has existed as to the propriety of an award to compensate for inflation, that confusion has now been dissolved by this Court's recent en banc decision in Johnson v. Penrod Drilling Co., 5 Cir. 1975, 510, F.2d 234. Despite the inflationary trend now existing in this country, the court noted in *Penrod* that, 'we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages.'"

Griffith contends that the Fifth Circuit decision in *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970), should be the controlling decision as to an award based on the anticipated annual increase in the cost of living, rather than *Johnson v. Penrod*. However, the *Cun-*

ningham decision is not a viable precedent and was merely a narrow holding that the objection to the jury charge was without merit; the jury charge itself was limited to *present* purchasing power of money. This is entirely different from the future speculative trends regarding inflation.

Griffith further contends that this question on inflation presents a "genuine controversy" which is revealed by the divided Court in *Johnson v. Penrod.* To the contrary, however, it is quite obvious that the *Johnson* court was not seriously divided since Chief Judge Brown, who dissented on the inflation issue, filed no opinion in support of his dissent.

It is submitted that future inflation cannot be considered in estimating "present awards of future dollars" as is argued by Griffith, because tort recoveries are paid in today's dollar with current purchasing power. Once a lump sum payment is made, inflation is to a large measure irrelevant because no amount will be paid in the inflated dollars. The present value of money is the only basis on which to assess lump sum damage awards that is not characterized by extreme speculation.

It is neither reasonable nor logical that inflation should have an effect on future awards for lost wages or earnings paid in a lump sum in current dollars. Consideration of inflation as an element of damages is definitely confusing and erroneous. Any inflationary trend which is generally and reasonably projected will be provided for at the market place by the rates of return on long-term investments, in the form of bonds, or by the fact that other investments, whether in property, mutual funds or stocks, will reflect in their values at a future date, the actual effect of any

inflationary, or deflationary trend encountered in the interim. Where the market so provides against inflation the Court's award of inflationary damages would constitute a duplication of the inflationary factor.

Furthermore, damages in a death action are fixed at the time of death. Examples of adherence by the court to this doctrine include the refusal in death actions to speculate on the prospect of remarriage or even to permit that fact to be revealed when it has occurred between the time of the death and the trial. Accordingly, we submit that it is infinitely more speculative and unrealistic for the court to attempt to forecast an economic future where real world facts are ignored.

In other words, if more dollars are added to the present award of damages on the ground that inflation would have increased the future earnings of the claimant which will now be lost ,it must be remembered that the additional dollars earned in the future would have smaller purchasing power because of that inflation, and yet the present judgment would be paid in current dollars with their current purchasing power. Thus, a plaintiff would get present "big" dollars to compensate him for the loss of future "little" (decreased purchasing power) dollars, and even if the computation of prophesized future inflation turned out to be exactly right, plaintiff would have received a windfall. A present judgment is paid in present dollars, not shrunken by future inflation, which can be put to immediate use in purchases and investments at the present price level.

It is significant to recognize that any reasonable form of equity investment, such as a home or rental property, will be a hedge against inflation. In other words, the award

presently received by a plaintiff may be invested so as to protect against future inflation by capital growth, as well as producing income in the meanwhile.

Furthermore, a lump sum payment of the damages presents an opportunity for a highly lucrative capital investment. The award may be immediately invested in bonds or with a Homestead Association which would yield an annual return rate of interest. Hypothetically, in the case of a deceased seaman who was earning $7,000.00 annually, a damage award of $100,000.00 to his survivors could be invested to yield a yearly rate of interest of 8% i.e. $8,000.00 per year, which would be more than the seaman had been earning. In addition, the principal would remain intact, thus providing an estate of $100,000.00 which could never have been amassed by the seaman if he had lived. This has never been the concept by which damages are awarded and should not now be allowed by the Court.

In conclusion, it is respectfully submitted that the Circuit Court was correct in relying upon the clear intent of the Supreme Court decision in *Kelly*, i.e., that future payments are to consist of their present value only; resort to the speculative inflationary trend to offset the discount to present value is and should remain prohibited.

CONCLUSION

It is respectfully concluded that Pilot Griffith was the sole cause of the collision in this case and his actions constituted negligence on his part. Captain Stroschein and Captain Daley did not in any way contribute to the collision and they were free from fault. The opinion of the Fifth Circuit should be affirmed in holding Griffith guilty of

negligence and reversed on holding Stroschein, Daley and Canal Barge negligent.

The Fifth Circuit opinion should be affirmed on holding inflation consideration was improper, and on the personal living expense deduction for Griffith's Estate, but it should be reversed on its denial of income tax deduction from damages.

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Reply Brief has been forwarded to all counsel of record by depositing same in the U. S. mail, postage prepaid, addressed to their offices this day of September, 1975.

Robert B. Acomb, Jr.